ELECTRONICALLY FILED SEP 25, 2018 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	S.CT. NO. 18-0184
	)	
BERNARD SMITH,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR STORY COUNTY
HONORABLE TIMOTHY J. FINN, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On the 25th day of September, 2018, 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 Bernard Smith, No. 0807097, Mt Pleasant Correctional Facility, 1200 East Washington St., Mt. Pleasant IA 52641.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT FAILED TO COMPLY WITH THE REQUIREMENTS OF STATE V. HARRINGTON, RENDERING THE DEFENDANT'S GUILTY PLEA TO THE HABITUAL OFFENDER ENHANCEMENT UNKNOWING, INVOLUNTARY, AND WITHOUT A FACTUAL BASIS.

Authorities

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II. THE DISTRICT COURT ERRED BY ORDERING THE DEFENDANT TO PAY RESTITUTION FOR ATTORNEY'S FEES.

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III. THE DISTRICT COURT ERRED BY IMPOSING A FINE.

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ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issues raised involve applying existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal of a judgment of conviction following a jury trial for burglary in the second degree as an habitual offender in Story County case number FECR055958.

Course of Proceedings: On September 27, 2017, the State charged the defendant, Bernard Smith, with burglary in the second degree in violation of Iowa Code sections 713.1, 713.5 (2017), a class C felony. The State also alleged Smith was an habitual offender under Iowa Code section 902.8 (2017), which enhances his sentence from 10 years to 15 years and adds a mandatory minimum of 3 years. (Trial Information) (App. pp. 4-6). On September 29, 2017, Smith entered a plea of not guilty. (Written Arraignment and Plea of Not Guilty) (App. pp. 7-9). The matter was tried to a jury beginning on November

28, 2017. (Trial tr. p. 1, L. 1-25). On November 29, 2017, the jury found Smith guilty of burglary in the first degree. (Trial tr. p. 146, L. 19-25). On January 16, 2018, the court sentenced Smith to 15 years in prison. (Sentencing Order) (App. pp. 10-13). On January 25, 2018, Smith filed a Notice of Appeal. (Notice of Appeal) (App. p. 14).

Facts: On September 20, 2017, at around 7:30 a.m., Tracy Jones arrived at the Olde Main Brewing Company (Olde Main) in Ames, Iowa, where she worked as a waitress. (Trial tr. p. 15, L. 1 - p. 16, L. 6). Olde Main opens to the public at 11:00 a.m. The only people in the building at the time besides her were some electricians. (Trial tr. p. 16, L. 10-13; p. 35, L. 12-15). Around 9:00 a.m. she noticed someone hunched down behind the bar in the restaurant area. There was a green bag on the floor next to him. (Trial tr. p. 20, L. 4-22; p. 22, L. 2-4). She said something to him, and he stood up and walked out of the building through the back door. She followed him and tried to get him to stop. (Trial tr. p. 23, L. 10-25). Once she was outside of the building she noticed a police officer sitting in his

car in the parking lot. She approached him and told him what happened. She pointed to the man who was walking through the same lot, identifying him as the man who was inside the restaurant. (Trial tr. p. 25, L. 2 – p. 26, L. 22). The officer followed the man and stopped him. (Trial tr. p. 73, L. 6 – p. 74, L. 15).

Jones went back into the restaurant and discovered the green bag contained 3-4 bottles of alcohol in it. The alcohol belonged to Olde Main. (Trial tr. p 27, L. 3-14). Other officers arrived and she showed them the bag that contained the bottles of alcohol. The bag did not come from the restaurant. (Trial tr. p. 97, L. 11 – p. 99, L. 4). The man stopped outside of the restaurant was the defendant, Bernard Smith. He told officers that he had been inside Olde Main, but was not behind the bar. He was there to get a job application. (Trial tr. p. 75, L. 1 – p. 77, L. 11). He was arrested and charged with burglary in the second degree. (Trial tr. p. 80, L. 18-25).

The general manager of Olde Main testified that he knew Smith because Smith had previously worked at Olde Main.

(Trial tr. p. 61, L. 12-25). The manager said that Olde Main was not open to the public at 9:00 a.m. on that day and that Smith did not have permission to be in the building or behind the bar. (Trial tr. p. 56, L. 23 – p. 57, L. 15; p. 63, L. 2-8).

Further relevant facts will be discussed below.

ARGUMENT

I. THE DISTRICT COURT FAILED TO COMPLY WITH THE REQUIREMENTS OF STATE V. HARRINGTON, RENDERING THE DEFENDANT'S GUILTY PLEA TO THE HABITUAL OFFENDER ENHANCEMENT UNKNOWING, INVOLUNTARY, AND WITHOUT A FACTUAL BASIS.

Preservation of Error and Standard of Review: The "admission by an offender to the prior convictions to support sentencing as a habitual offender is comparable to a plea of guilty to support sentencing for the crime identified in the plea." State v. Harrington, 893 N.W.2d 36, 42 (Iowa 2017). "[O]ffenders in a habitual offender proceeding must preserve error in any deficiencies in the proceeding by filing a motion in arrest of judgment." Id. at 43. However, "this requirement does not apply where a defendant was never advised during the plea proceedings, as required by Rule 2.8(2)(d), that challenges

to the plea must be made in a motion in arrest of judgment and that the failure to challenge the plea by filing the motion within the time provided prior to sentencing precludes a right to assert the challenge on appeal." State v. Meron, 675 N.W.2d 537, 540 (Iowa 2004); *see also* Iowa R. Crim. P. 2.8(2)(d). Counsel did not file a motion in arrest of judgment in this case. However, the court failed to adequately advise the defendant that he had a right to challenge his plea by filing a motion in arrest of judgment. The court merely told the defendant that he had the "right to file what's called a motion in arrest of judgment." (Trial tr. p. 148, L. 2-24). The court did not explain to the defendant what that motion was or the consequences of failing to file the notice as is required by Iowa Rule of Criminal Procedure 2.8(2)(d). Rule 2.8(2)(d) states:

> The court shall inform the defendant that any challenges to a plea of guilty based on alleged defects in the plea proceedings must be raised in a motion in arrest of judgment and that failure to so raise such challenges shall preclude the right to assert them on appeal.

The court must substantially comply with this rule before a defendant will be precluded from raising an issue on appeal.

See State v. Fisher, 877 N.W.2d 676, 680-681 (Iowa 2016) (finding insufficient compliance with the rule when the guilty plea form did not advise the defendant that failing to file the motion cut off any right to challenge the plea); State v. Hinner, 471 N.W.2d 841, 845 (Iowa 1991) (stating that a knowing and voluntary waiver of a right to appeal presupposes that the defendant knows about the right and intentionally relinquishes it). Here the court did not mention the purpose of filing a motion in arrest of judgment. The court did not mention that failure to file the motion waived his right to appeal. Therefore, the court did not substantially comply with the rule, and the defendant is not precluded from raising the issue on appeal.

However, if the court finds that this advisory was sufficient, the issue should be reviewed in the context of ineffective assistance of counsel for counsels' failure to preserve the issue for appeal. State v. Hrbek, 336 N.W.2d 431, 435-36 (Iowa 1983); State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982). "When a defendant's counsel does not challenge the entry of a guilty plea to an offense for which no factual basis is shown and

a strong possibility exists that there was no factual basis," the Iowa Supreme Court has held that the court can review a challenge to the plea "notwithstanding a failure to file a motion in arrest of judgment." State v. Royer, 632 N.W.2d 905, 909 (Iowa 2001).

Claims of error in guilty plea proceedings are reviewed for correction of errors at law. *See* Iowa R. App. P. 6.907; *see also* Meron, 675 N.W.2d at 540. Claims of ineffective assistance of counsel concern constitutional rights, and the standard of review is therefore de novo. State v. Osborn, 573 N.W.2d 917, 920 (Iowa 1998).

Discussion: Prior to trial, counsel for the defendant, Bernard Smith, told the court that he wished to have the habitual offender matter heard separately from the guilt phase. (Trial tr. p. 6, L. 12-24). Following the State's case, the parties made a record regarding the defendant's choice not to testify. The court seemed to conflate the defendant's decision not to testify with an admission that he was an habitual offender:

THE COURT: Okay. We're at the point where the

Defendant if he's going to offer evidence needs to make that determination. I've not pushed you on that but do you know if your client is going to testify or not?

. . .

[DEFENSE COUNSEL]: Your Honor, my client has chose [sic] not to testify in this matter.

THE COURT: Very well. I need to make a record on that with you; okay?

THE DEFENDANT: Okay.

THE COURT: [Defense Counsel] has indicated that you elected not to testify and that certainly is your right' okay? I need to kind of explore a few things with you.

You have denied the allegations. That's a presumption that goes with you throughout the evidence until such time, if ever, that the State proves that you're guilty beyond a reasonable doubt.

But one of the elements that you're giving up is this; is that there is also a second part of this criminal case and that is that your part that you are alleged to have committed these crimes before.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Okay. And do you want to admit that violation or deny that allegation?

THE DEFENDANT: (No audible response was given by the Defendant.)

THE COURT: It's what we call a bifurcated trial.

(At this time there is an off-the-record-discussion between [Defense Counsel] and the Defendant.)

. . .

[DEFENSE COUNSEL]: Your Honor, what my client is confused about is if he does stipulate to the priors, he doesn't want that to go to the jury now.

So he would like the jury to return a verdict; and I think that's a very strong likelihood if they return a guilty verdict that he will stipulate.

THE COURT: Okay. All right. So you want to defer

making a decision on that?
THE DEFENDANT: Correct.

(Trial tr. p. 109, L. 5 – p. 110, L. 22). The court went on to discuss Smith's decision not to testify in the guilt phase of the proceedings. (Trial tr. p. 111, L. 1-25). After the case was submitted to the jury, counsel for Smith informed the court that his "client has decided that he will withdraw his request for a bifurcated trial and will stipulate to the priors . . . should the jury return a guilty verdict . . . ." (Trial tr. p. 145, L. 13-16). The court turned to Smith and the following exchange took place: "I told you earlier about the ramifications of doing that. It's your decision and you voluntarily decided that you will stipulate to the habitual offender element of the trial? THE DEFENDANT: Yes. THE COURT: Okay. All right. Thank you." (Trial tr. p. 145, L. 21 – p. 146, L. 1). No further discussion was held at that time about the enhancement.

After the jury returned a verdict of guilty to burglary in the second degree, defense counsel expressed concern over the adequacy of the record on Smith's stipulation to the

enhancement:

> [DEFENSE COUNSEL]: Your Honor, [the prosecutor] brought to my attention a case *State v. Harrington, 983 N.W.2d at 36.* It concerns a Defendant making admissions to the habitual offender without the State having to prove it up and the issue of bringing it up in a motion in arrest of judgment or making an adequate record.
>
> I believe we probably have an adequate record but just to be safe, it probably would be best to maybe supplement the record a little bit at this time, that the defendant did freely voluntarily stipulate to the priors of that habitual offender.
>
> THE COURT: All right. I think we did that. But you're in agreement on that; aren't you?
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right. Thank you. I appreciate that. You understand that's voluntary on your part and you elected to go along with that?
>
> THE COURT: Okay. I have one last thing I need to tell you about. You have the right to file what's called a motion in arrest of judgment. That motion has to be filed at least I think it's five days or three days?
>
> [THE PROSECUTOR]: Five days, Your honor.
>
> THE COURT: Five day before the date of sentencing. I set your sentencing on January 16th. So if you want the Court to consider that, it has to be filed at least five days before January 16th.
>
> Do you understand that?
>
> . . .
>
> [THE PROSECUTOR]: Your Honor, I think it's forty-five days but no less than five days before sentencing.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: That is correct.
>
> THE COURT: All right. Got that?
>
> THE DEFENDANT: Yes.

THE COURT: Okay. All right. That will conclude the hearing.

(Trial tr. p. 148, L. 4 – p. 149, L. 18).

Iowa Rule of Criminal Procedure 2.19(9) governs the procedure for trials involving prior convictions. The rule provides that the offender has the opportunity to affirm or deny that he or she is the same person previously convicted. If he or she denies being the person previously convicted, the issue of the identity is tried to a jury. If the offender admits to being the person previously convicted, the court must sentence him or her under the enhancement statute. Iowa R. Crim. P. 2.19(9). However, "[an] affirmative response by the defendant under the rule . . . does not necessarily serve as an admission to support the imposition of an enhanced penalty as a multiple offender." State v. Kukowski, 704 N.W.2d 687, 692 (Iowa 2005). "The court has a duty to conduct a further inquiry, similar to the colloquy required under rule 2.8(2), prior to sentencing to ensure that the affirmation is voluntary and intelligent." Id. The court may not accept a guilty plea without first determining

that it is made voluntarily and intelligently and has a factual basis. State v. Harrington, 893 N.W.2d 36, 45 (Iowa 2017).

Just like guilty pleas to substantive crimes, courts must follow the same protocol in a habitual offender proceeding. "First, the court must inform the offender of the nature of the habitual offender charge and, if admitted, that it will result in sentencing as a habitual offender for having 'twice before been convicted of a felony.'" Id. (quoting Iowa Code § 902.8 (2017)). The court is also required to inform the offender that the prior convictions are only valid if he or she was represented by counsel or that counsel was knowing and voluntarily waived. Id. In addition, the court must establish that a factual basis exists for the admission to the prior convictions. Id. at 45-46. The court must inform the offender of the maximum punishment under the enhancement and the mandatory minimum punishment. Id. at 46. The court must inform the offender of all of the trial rights enumerated in Iowa Rule of Criminal Procedure 2.8(2)(b)(4). Id. The court must also tell the offender that by admitting to the prior convictions no trial

will take place. The court must tell the offender that "the state is not required to prove the prior convictions were entered with counsel if the offender does not first raise the claim." Id. The district must also inform the offender that any challenges to the admission must be raised in a motion in arrest of judgment and failure to do so will preclude the right to assert those challenges on appeal. Id.

During the plea colloquy in this case, the court failed to abide by almost all of these requirements. The court merely asked Smith if he voluntarily admitted to the priors. No specific priors were identified and there was no discussion about whether Smith was represented by counsel for the priors. The court failed to advise Smith of the maximum and minimum penalties are for the habitual offender enhancement. The maximum possible sentence is not mentioned in the record until the sentencing hearing where the prosecutor corrected the PSI recommendation for a 10 year sentence by informing the court that the habitual offender statute carries a 15 year sentence. (Sentencing tr. p. 3, L. 18-25). The minimum

sentence of 3 years is never mentioned in the record during the trial or during the sentencing hearing. The PSI contains no mention of the habitual offender sentencing enhancement and recommends a 10 year prison sentence. (PSI) (Conf. App. pp. 8-24). The sentencing order contains no mention of the minimum sentence. It is entirely possible the defendant did not know about the minimum sentence until he arrived at the prison.

Although the trial had just concluded on the burglary charge and the parties briefly discussed the waiver of a "bifurcated trial," the court did not go through the trial rights that the defendant was giving up by admitting to the previous felonies. The court did not explain that the state would not have to prove that the prior conviction were with counsel unless he raised that issue. The court told Smith that he could file a motion in arrest of judgment but did not explain the purpose of such motion or that the failure to file the motion would preclude his ability to raise the issue on appeal.

Finally, the court failed to establish a factual basis.

During the colloquy, there was no mention of the specific convictions that the defendant was admitting to. The trial information listed 8 convictions alleged to have previously been committed by the defendant. (Trial Information; Minutes of Testimony) (App. pp. 4-6) (Conf. App. pp. 4-6). There is also no indication that the crimes were consecutively committed as there are no dates of the commission of each offense. Indeed there are two conviction on May 31, 1991, and two convictions on January 17, 2006. The State would not have been able to use multiple convictions on the same day as it would have been impossible for one to have been committed subsequent to the sentencing of the other one. State v. Conley, 222 N.W.2d 501, 503 (Iowa 1974) (holding that the first conviction and imposition of sentence must precede the second offense).

There was no identifying information in the plea colloquy or in the minutes of testimony that would establish whether the defendant was the same person who was previously convicted. "Under Iowa law, the identity of names between the defendant and a defendant named in a judgment of conviction, by itself, is

insufficient to establish the defendant as a habitual offender." State v. Jordan, 663 N.W.2d 877, 881 (Iowa 2003). "There must be additional evidence showing the defendant is the same person named in the judgment of conviction." Id. at 881-882. In this case there was no identifying information about the Bernard Smith who had previously been convicted in the cases listed in the trial information. Three of the cases were not identified with a case number. There was no mention of a social security number or other identifying information for the previous conviction. The minutes of testimony merely list the clerk of court for three counties who would testify regarding the convictions. (Minutes of Testimony) (Conf. App. pp. 4-6). The State filed a notice of additional minutes of testimony that listed a probation/parole officer. This witness would testify that he had supervised the defendant in three cases in Story County. He would testify "to his knowledge of the defendant; that he will testify as to the defendant's demeanor; that he will testify as to the police reports in this matter attached hereto and by this reference are incorporated herein." (Notice of Additional

Minutes of Testimony, 10/3/2017) (Conf. App. p. 7). No police reports were attached to this document. Although the minute states this witness would testify about his knowledge of the defendant, it does not state that he will identify him as the same person as previously convicted or any basis for such identification.

Finally, the surname "Smith" has been the most common surname in the United States in the previous 3 census counts. U.S. Census Bureau, https://www.census.gov/library/visualizations/2016/comm/cb16-tps154_surnames_top15.html (last visited, 5/31/2018). "Bernard" as a first name was ranked as the 142nd most common name in 2005. https://names.mongabay.com/male_names_alpha.htm (last visited May 31, 2018). Therefore the uniqueness of the name is not a factor as "Bernard Smith" is a fairly common name. *See* State v. Jordan, 663 N.W.2d 877, 882 (Iowa 2003) (finding the uniqueness of the defendant's name one factor among many in determining there was sufficient evidence to show establish

the identity of the defendant for purposes of the habitual offender statute).

The defendant's admission to the habitual offender enhancement did not comply with the requirements as established in Harrington, and the matter must be reversed and remanded. *See* Harrington, 893 N.W.2d at 43 n.2 (stating that the question on appeal "is not whether Harrington suffered no prejudice because evidence existed to establish the prior convictions, but whether Harrington knowingly and voluntarily admitted the prior convictions); State v. Miller, No. 16-2110, 2018 WL 1099580, *4-5 (Iowa Ct. App. 2/21/2018) (rejecting the State's prejudice argument in similar case and stating the proper remedy was to vacate the sentence and remand for further proceedings).

If the court determines that the issue was not preserved for review, the issue should be considered under the ineffective assistance of counsel framework. To prove a claim of ineffective assistance of counsel, the defendant must show (1) trial counsel failed to perform an essential duty, and (2)

prejudice resulted. Strickland v. Washington, 466 U.S. 668, 688 (1984). "Ineffective assistance under Strickland is deficient performance by counsel resulting in prejudice, with performance being measured against an 'objective standard of reasonableness,' 'under prevailing professional norms.'" State v. Maxwell, 743 N.W.2d 185, 195 (Iowa 2008) (quoting Rompilla v. Beard, 545 U.S. 374, 380 (2005)). "Defense counsel violates an essential duty when counsel permits [a] defendant to plead guilty and waive his right to file a motion in arrest of judgment when there is no factual basis to support defendant's guilty plea. Prejudice is presumed under these circumstances." State v. Ortiz, 789 N.W.2d 761, 764-765 (Iowa 2010); State v. Feregrino, 756 N.W.2d 700, 705-706 (Iowa 2008) (explaining that while ordinarily a defendant claiming ineffective assistance of counsel must show both a breach of a duty and prejudice, in the context of a deprivation of a constitutional right, the violation can amount to a structural defect in which prejudice is presumed).

Counsel had a duty to make sure any guilty plea complied

with the law and was a knowing and voluntary plea. Counsel in this case was even made aware of the Harrington case and somehow thought that the record made was sufficient when it was clearly not. This was a breach of an essential duty. Smith was prejudiced by this breach. He admitted to a sentencing enhancement without knowing the maximum and minimum penalties. He made the admissions without any factual basis. This plea was unknowing and involuntary. This is a structural defect and prejudice should be presumed. Prejudice also exists in fact because the plea resulted in 5 extra years in prison with a mandatory 3 year minimum. The plea should therefore be vacated.

II. THE DISTRICT COURT ERRED BY ORDERING THE DEFENDANT TO PAY RESTITUTION FOR ATTORNEY'S FEES.

Preservation of Error and Standard of Review: During the sentencing hearing, the matter of attorney's fees was not discussed. The court included the attorney's fees as part of the sentencing order. No objection was made to this order. (Sentencing Order) (App. pp. 10-13). No objection is necessary

to preserve an issue of irregularity in sentencing for appeal. State v. Mai, 572 N.W.2d 168, 170-171 (Iowa Ct. App. 1997) (finding defendant's failure to object to restitution during sentencing hearing where restitution was ordered because there was no need to object to sentencing irregularity); State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994) (finding defendant need not object to sentencing irregularity to preserve issue for appeal). Preservation of error requirements are relaxed in cases involving sentencing issues. State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010). Additionally, when a plan of restitution has been made part of the sentencing order, the defendant has the right to a direct appeal. State v. Kurtz, 878 N.W.2d 469, 472 (Iowa Ct. App. 2016). Furthermore, when a court makes a finding of the defendant's ability to pay in the sentencing order, the appellate court can review that order. *See, e.g.* State v. Pace, No. 16-1785, 2018 WL 1629894, at *3 (Iowa Ct. App. April 2, 2018).

The court reviews a district court's restitution order for errors of law. State v. Paxton, 674 N.W.2d 106, 108 (Iowa

2004).

Discussion: In this case, the district court ordered that the defendant pay restitution for attorney's fees without specifying the amount of the restitution and without finding that the defendant had a reasonable ability to pay. (Sentencing Order) (App. pp. 10-13). The district court is required to order restitution in all criminal cases where there is a guilty plea or a verdict of guilt. Iowa Code § 910.2(1) (2017). Restitution is defined as "payment of pecuniary damages to a victim in an amount and in the manner provided by the offender's plan of restitution." Id. § 910.1(4). In general, "restitution ordered to the victim is made without regard to the defendant's ability to pay." State v. Wagner, 484 N.W.2d 212, 215-216 (Iowa Ct. App. 1992). "However, restitution is ordered for crime victim assistance reimbursement, for public agencies, for court costs including correctional fees, for court-appointed attorney fees, for contribution to local anticrime organization, and for the medical assistance program only to the extent the defendant is reasonably able to pay." Kurtz, 878 N.W.2d at 472 (citing Iowa

Code § 910.2(1) (2015). "Constitutionally, a court must determine a criminal defendant's ability to pay before entering an order requiring such defendant to pay criminal restitution pursuant to Iowa Code section 910.2." Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000). The defendant has the burden to show either a failure of the court to exercise discretion or an abuse of that discretion. State v. Van Hoff, 415 N.W.2d 647, 648 (Iowa 1987).

The Iowa Court of Appeals has reversed restitution orders when the district court failed to make a determination of the defendant's ability to pay and when the court found the defendant had the ability to pay despite the fact that the amount of the fees had yet to be determined. State v. Tanner, 14-1963, 2016 WL 4384468, at *5 (Iowa Ct. App. Aug. 17, 2016) (vacating the restitution portion of the sentence because the appellate court could not determine whether the court reasonably exercised its discretion when it ordered restitution for attorney's fees and victim compensation); State v. Pace, 16-1785, 2018 WL 1629894, at *3 (Iowa Ct. App. April 2, 2018)

(vacating the restitution portion of the sentencing order because the court abused its discretion when it determined the defendant was able to pay jail fees without knowing the amount of those fees).

In this case, there was no hearing or discussion about whether the defendant had the ability to pay attorney's fees. The sentencing order simply orders that the defendant "reimburse the state for the reasonable fees of his court-appointed attorney. The Defendant's attorney is given 10 days within which to file a statement of the legal services he has provided for the Defendant. All costs, surcharges and fees are due immediately and shall be considered delinquent if not paid within 30 days of today's date." (Sentencing Order) (App. pp. 10-13). Because the district court ordered restitution without specifying the amount to be paid and without finding that the defendant had a reasonable ability to pay, that portion of the sentencing order should be vacated.

III. THE DISTRICT COURT ERRED BY IMPOSING A FINE.

Error Preservation and Standard of Review: An illegal

sentence is not subject to the usual requirements of error preservation. State v. Dann, 591 N.W.2d 635, 637 (Iowa 1999). Illegal sentences are reviewed for correction of errors at law. State v. Davis, 544 N.W.2d 453, 455 (Iowa 1996).

Discussion: To be illegal under Iowa Rule of Criminal Procedure 2.24(5)(a), a sentence must be one that is not authorized by statute. Iowa R. Crim. P. 2.24(5)(a) (2016); Tindell v. State, 629 N.W.2d 357, 359 (Iowa 2001). "The legislature possesses the inherent power to prescribe punishment for crime, and the sentencing authority of the courts is subject to that power. A sentence not permitted by statute is void." State v. Ohnmacht, 342 N.W.2d 838, 842 (Iowa 1983) (citations omitted).

In this case, the court imposed a fine of $1000 plus surcharge. It suspended the fine. (Sentencing Order) (App. pp. 10-13). This fine is not authorized by statute. Had the Smith been found guilty of burglary in the second degree without the habitual offender enhancement, he would have been subject to a fine of no less than $1,000 and no more than

$10,000. Iowa Code § 902.9(1)(d) (2017). Such a sentence is permitted under the general sentencing provisions for class C felonies found in Iowa Code section 902.9. Id. The habitual offender statute under which defendant was sentenced does not provide for a fine, but it also does not preclude another statute from specifying a separate fine for a particular offense. State v. Carstens, 594 N.W.2d 436, 437 (Iowa 1999). Because the defendant was sentenced as a habitual offender, however, the general sentencing provisions for class C felonies "not an habitual offender" did not apply to him. See Iowa Code § 902.9(1)(d) (2017) (providing penalties for non-habitual class C offenses).

The statute applicable to his underlying offense does not identify a fine separate from the general sentencing provisions; therefore the district court had no authority to impose a fine for defendant's habitual offender sentence. See, e.g., State v. Halterman, 630 N.W.2d 611, 613-614 (Iowa Ct. App. 2001) (holding district court had no authority to impose a fine where defendant was sentenced as an habitual offender and sex abuse

statute did not identify a specific fine). Even though the district court in this case suspended the fine, it still imposed a fine it had no authority to impose. Therefore that portion of the sentencing order should be vacated.

CONCLUSION

The Appellant requests the Court vacate the conviction for habitual offender. The Appellant also requests the Court vacate the restitution order and the fine.

NONORAL SUBMISSION

Counsel requests not to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $3.76, and that amount has been paid in full by the Office of the Appellate Defender.

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