IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-0184

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BERNARD ANTHONY SMITH,
Defendant-Appellant.

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

APPELLEE'S BRIEF

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ROUTING STATEMENT

This case can be decided based on existing legal principles. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Defendant Bernard Smith appeals his conviction and sentence following a jury's verdict finding him guilty of second-degree burglary.

Course of Proceedings

The State accepts the defendant's statement of the course of proceedings as substantially correct.

Facts

Defendant Bernard Smith used to work as a dishwasher at Olde Main restaurant in Ames. Trial Tr. p. 61, line 12 – p. 62, line 2. His employment ended on June 13, 2017. Trial Tr. p. 62, lines 3–7.

On September 20, 2017, Olde Main waitress Tracy Jones started her shift around 7:30 a.m. Trial Tr. p. 17, lines 11–13. The restaurant and pub do not open to the public until 11 a.m., and those hours are posted on all the doors. Trial Tr. p. 16, lines 10–13, State's Ex. 9–11, 15 (photos); Ex. App. 11–14. That morning the doors were unlocked

because some electricians were working in the building. Trial Tr. p. 19, line 17 – p. 20, line 9.

At around 9 a.m., Jones noticed a man "scrunched" in the darkness behind the bar. Trial Tr. p. 20, lines 10–22. She saw the man move his arm away from the bottom shelf where unopened liquor bottles were stored. Trial Tr. p. 21, lines 7–19. A large bag was sitting on the ground inches away from the man. Trial Tr. p. 21, line 25 – p. 22, line 6. The bag contained three unopened bottles of liquor with markings indicating they belonged to Olde Main. Trial Tr. p. 27, line 8 – p. 30, line 22, p. 98, line 10 – p. 99, line 15, p. 101, lines 5–25; State's Ex. 1–4 (photos); Ex. App. 3–10.

Jones asked the man if he was all right and if he needed help. Trial Tr. p. 22, lines 7–10. The man stopped moving completely and did not answer Jones as she kept asking if he was OK. Trial Tr. p. 22, lines 10–14. Then the man stood up and walked through the restaurant toward the back door. Trial Tr. p. 22, line 15 – p. 23, line 19. Jones followed and kept telling him to stop. Trial Tr. p. 23, line 20 – p. 24, line 3.

Jones did not lose sight of the man as she followed him outside. Trial Tr. p. 24, line 4 – p. 25, line 1. She noticed a police car parked in the lot, so she pointed out the man and explained that she had just chased him out of the building. Trial Tr. p. 25, line 2 – p. 26, line 24. Officer Harry Samms had been completing paperwork when Jones approached his squad car. Trial Tr. p. 70, line 18 – p. 73, line 13. Jones pointed out the suspect, and—without losing sight—Officer Samms pursued the man. Trial Tr. p. 73, line 14 – 74, line 25.

Officer Samms caught up to the man and identified him as defendant Smith. Trial Tr. p. 75, lines 1–22. Smith seemed nervous. Trial Tr. p. 78, lines 19–22. He admitted being inside Olde Main, but he claimed he was there to apply for a job. Trial Tr. p. 76, line 17 – p. 77, line 6. He denied stealing alcohol and denied being behind the bar. Trial Tr. p. 77, lines 7–11.

After being arrested, Smith claimed he was only guilty of trespass and theft. Trial Tr. p. 81, lines 6–14.

Smith has multiple prior felony convictions for burglaries, thefts, and OWI in three counties across Iowa. Minutes (9/27/2017), Add'l Minutes (10/3/2017); Conf. App. 5, 7.

ARGUMENT

I. Smith Failed to Preserve Error by Not Filing a Motion in Arrest, and He Fails to Prove Ineffective Assistance Related to His Habitual-Offender Stipulation.

Preservation of Error

Smith did not preserve error because he did not file a motion in arrest of judgment. "[O]ffenders in a habitual offender proceeding must preserve error in any deficiencies in the proceeding by filing a motion in arrest of judgment." *State v. Harrington*, 893 N.W.2d 36, 43 (Iowa 2017). *Harrington* applied the rule prospectively, so it applies to Smith whose trial occurred more than seven months after *Harrington* was decided. *See* Trial Tr. p. 1, lines 10–13 (indicating Smith's trial commenced on November 28, 2017).

Smith seeks exception from error preservation, arguing the district court "failed to adequately advise" him of the duty to file a motion in arrest. Def. Br. at 14. The district court told Smith he had "the right to file what's called a motion in arrest of judgment" and advised him of the timeframe to file such a motion. Trial Tr. p. 148, line 22 – p. 149, line 14. When the court asked, "Got that?," Smith replied "yes." Trial Tr. p. 149, lines 15–16. Smith, however, complains this warning "did not mention the purpose of filing a

motion in arrest" and "did not mention that failure to file the motion waived his right to appeal." Def. Br. at 15.

By seeking this exception, Smith expands on a concept that this Court has never extended to motions in arrest outside of the guilty-plea context. He cites *State v. Meron*, 675 N.W.2d 537, 540 (Iowa 2004), *cited in* Def. Br. at 14, in which the Court excused the defendant's failure to file a motion in arrest to challenge her guilty plea because she was not "informed by the district court of the purpose of the motion or the consequences of failing to file the motion." *See* Def. Br. at 14. The *Meron* rule reflects Iowa Rule of Criminal Procedure 2.24(3)(a), which states the failure to challenge a "guilty plea proceeding" in a motion in arrest precludes an appellate challenge. *Harrington* could have—but did not—extend the *Meron* rule to habitual offender proceedings. Instead, *Harrington* and subsequent cases have only excused the failure to file a motion in arrest for defendants whose colloquies occurred before *Harrington*. *See Harrington*, 893 N.W.2d at 43 (excusing the defendant's failure to preserve error with a motion in arrest because "we apply this rule of law prospectively"); *State v. Brewster*, 907 N.W.2d 489, 493 n.3 (Iowa 2018) (same); *State v. Steiger*, 903 N.W.2d 169, 170 (Iowa

2017) (same); *State v. Newton*, No. 16-1525, 2018 WL 739251, at *6 (Iowa Ct. App. Feb. 7, 2018) (same). Because *Harrington* already announced the exception to filing a motion in arrest for habitual offender proceedings, nothing compels extending the *Meron* exception outside the context of guilty-plea cases.

Smith still has the opportunity to challenge his habitual offender proceedings. He makes the alternative argument that counsel was ineffective for not challenging the adequacy of the habitual-offender colloquy. Def. Br. at 15. The ineffective assistance framework permits people like Smith to challenge the voluntariness of their habitual-offender stipulations without granting the windfall of reversal for any technical defect in their colloquy.

Without conceding Smith's failure to preserve error, the State will address the merits of his complaints as claims of ineffective assistance. *See State v. Begey*, 672 N.W.2d 747, 749 (Iowa 2003) (recognizing that claims of ineffective assistance are an exception to the normal error preservation rules).

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant claiming ineffective assistance must prove both that counsel's performance was deficient and that prejudice resulted. *Id.* at 687.

Under the first prong, the defendant must show counsel's representation fell below an objective standard of reasonableness. *Id.* at 687–88. The reviewing court must be highly deferential to counsel's performance, avoid judging in hindsight, and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. To prove the second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Defendants can raise claims of ineffective assistance on direct appeal if they have "reasonable grounds to believe that the record is adequate to address the claim on direct appeal." Iowa Code § 814.7(2) (2017). "[I]f a defendant wishes to have an ineffective-assistance claim resolved on direct appeal, the defendant will be required to establish an adequate record to allow the appellate court to address the issue." *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). "If, however, the court determines the claim cannot be addressed on appeal, the court must preserve it for a postconviction-relief proceeding, regardless of the court's view of the potential viability of the claim." *Id.*

Discussion

Smith fails to prove ineffective assistance concerning the adequacy of his habitual-offender colloquy. First, the record as a whole—including Smith's admissions—provide a factual basis that he has at least two previous felony convictions. Second, the current record does not establish that a more complete colloquy would have persuaded him to insist on a trial for his prior convictions. Accordingly, this Court should affirm his conviction and sentence.

A. A factual basis supports Smith's habitual offender sentence.

Smith's ineffective assistance claim requires him to prove the record lacked a factual basis. Before accepting a stipulation in a habitual offender proceeding, "the court must . . . make sure a factual basis exists to support the admission to the prior convictions." *State v. Harrington*, 893 N.W.2d 36, 45–46 (Iowa 2017); *see also State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001) (applying the same rule for guilty pleas); Iowa R. Crim. P. 2.8(2)(b). "On a claim that a plea bargain is invalid because of a lack of accuracy on the factual-basis issue, the entire record before the district court may be examined." *State v. Finney*, 834 N.W.2d 46, 62 (Iowa 2013). "The trial court may ascertain that a factual basis for a guilty plea exists by (1) inquiry of the defendant; (2) inquiry of the prosecutor; (3) examination of the presentence report; or (4) reference to the minutes of testimony." *State v. Johnson*, 234 N.W.2d 878, 879 (Iowa 1974).

The minutes of testimony support a factual basis that Smith has at least two prior felony convictions. The trial information listed eight prior felonies: a 1990 second-degree burglary, a 1991 second-degree burglary, a 1991 second-degree theft, a 1999 third-offense OWI, a 2006 second-degree burglary, a 2006 third-degree burglary, a

2006 first-degree theft, and a 2014 second-degree theft. Trial Information (9/27/2017); App. 4–5. The minutes listed clerks for Story, Scott, and Polk Counties who would introduce records of those convictions. Minutes; Conf. App. 5. Additional minutes listed a probation officer who would testify that Smith was the same person convicted in three prior Story County cases. Add'l Minutes (10/3/2017); Conf. App. 7. These minutes more than suffice to establish that Smith has at least two prior felony convictions.

The presentence investigation report also supports a factual basis for Smith's prior convictions. The report lists prison terms and felony convictions from the State of Texas as well Davenport, Des Moines, Ames, and Huxley. PSI at 3–7; Conf. App. 10–14. When asked about the PSI at sentencing, Smith offered no additions or corrections. Sent. Tr. p. 4, lines 2–8. Therefore, the PSI serves as an undisputed record of Smith's prior felonies.

Finally, Smith's stipulations equate to an admission to at least two prior felony convictions. The court told Smith he could either admit or deny the allegation of prior convictions. Trial Tr. p. 109, line 25 – p. 110, line 25. Later, Smith personally affirmed his intention to withdraw the request for a trial and agreed to the stipulation

supporting the habitual offender enhancement. Trial Tr. p. 145, lines 11–25. And after the jury returned a guilty verdict for burglary, Smith again affirmed that he freely and voluntarily stipulated to the prior convictions. Trial Tr. p. 148, lines 4–21. These stipulations support a factual basis on the simple question of whether Smith had prior felony convictions, so there is no reason to question the adequacy of the record as a whole.

A factual basis supports the habitual offender sentence. The minutes of testimony, the PSI, and Smith's personal stipulations indicate he has at least two prior felony convictions. Although Smith now raises several questions that he could have explored by contesting the evidence at trial (Def. Br. at 23–26), his argument overlooks that the factual-basis inquiry does not require the same proof as if he had insisted on trial. *See Keene*, 630 N.W.2d at 581 (quotation omitted) (recognizing that a court accepting a guilty plea "must only be satisfied that the facts support the crime, 'not necessarily that the defendant is guilty'"). The record supports the habitual offender enhancement, so this Court should reject Smith's factual-basis challenge.

B. The record does not prove a reasonable likelihood that Smith would have insisted on trial.

At most, the current record only proves half of Smith's ineffective assistance claim. He identifies several shortcomings in the district court's habitual-offender colloquy. Def. Br. at 20–23. However, he fails to prove any reasonable likelihood that a more complete colloquy would have caused him to insist on a trial to establish his prior convictions. *Cf. State v. Straw*, 709 N.W.2d 128, 136 (Iowa 2006) (recognizing that to establish the prejudice prong of ineffective assistance in guilty-plea proceedings "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial").

Smith does not explain how he was prejudiced. The jury had already found him guilty of burglary. The stipulation only concerned the simple question of whether he had been convicted of at least two prior felonies. The State was prepared to offer evidence of his eight prior felony convictions in Iowa. *See* Minutes, Add'l Minutes (10/3/2017); Conf. App. 5, 7 (summarizing evidence from three county clerks and Smith's probation officer). Faced with these

circumstances, Smith had nothing to gain by insisting on a trial to prove his prior convictions.

The current record does not establish the prejudice prong of Smith's ineffective assistance claim. Even though the court did not follow the *Harrington* procedure, nothing proves that a more complete colloquy would have led Smith to insist on trial. Consequently, this Court should affirm his sentence and, at most, preserve his claim for further development in a postconviction relief action.

II. Smith Is Prematurely Challenging the Reasonable-Ability-to-Pay Ruling Entered After He Filed His Notice of Appeal.

Preservation of Error

"[E]rrors in sentencing may be challenged on direct appeal even in the absence of an objection in the district court." *State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010).

Standard of Review

"We review restitution orders for correction of errors at law." *State v. Jenkins*, 788 N.W.2d 640, 642 (Iowa 2010). "A defendant who seeks to upset a restitution order, however, has the burden to demonstrate either the 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).

Discussion

Smith fails to demonstrate error related to his reasonable ability to repay his court-appointed attorney fees. First, the claim is not ripe for review on direct appeal because the district court did not rule on his reasonable ability to pay before he filed his notice of appeal. Second, if Smith disagrees with the district court's post-appeal restitution plan of payment, then he should challenge it with a restitution hearing in the district court. This Court should not permit him to shortcut the established procedure.

Smith's ability-to-pay challenge is not ripe under the current appellate record. "[U]nlike direct causal-connection or amount-of-restitution challenges, 'ability-to-pay challenges to restitution are premature until the defendant has exhausted the modification remedy afforded by Iowa Code section 910.7.'" *State v. Plettenberg*, No. 17-1312, 2018 WL 2084814, at *2 (Iowa Ct. App. May 2, 2018) (quoting *State v. Richardson*, 890 N.W.2d 609, 626 (Iowa 2017)). In *Plettenberg*, the Court found the reasonable-ability-to-pay challenge was not ripe for review "[b]ecause no final plan of payment has been

entered." *Id.* Smith's sentencing judgment did not purport to determine his reasonable ability to pay attorney fees. *See* Judgment (1/16/2018); App. 10–12. And when Smith filed his notice of appeal, the court had not yet approved any restitution plan of payment. Consequently, the current appellate record does not contain a reasonable-ability-to-pay order for this Court to review. *See State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999) ("[I]t does not appear in the present case that the plan of restitution contemplated by Iowa Code section 910.3 was complete at the time the notice of appeal was filed. Until this is done, the court is not required to give consideration to the defendant's ability to pay.").

Smith should follow the established procedure to challenge the restitution plan of payment filed after his appeal. About two months after he appealed, the district court approved a restitution plan setting the amount of restitution and ordering him to pay 20% of all credits to his inmate account. Restitution Plan (3/20/2018); App. 27.[1] That amount of restitution presumably includes the $577.50 of

[1] Although this post-appeal ruling is not part of the record on appeal, the State proposes that the Court may reach outside the record when considering issues of ripeness. *Cf. In re L.H.*, 480 N.W.2d 43, 45 (Iowa 1992) ("Matters that are technically outside the record may be submitted in order to establish or counter a claim of

indigent defense fees his attorney was paid. Docket Report (1/26/2018) at 11; App. 25. Smith can challenge this amount and repayment rate at any time during his period of incarceration or parole. Iowa Code § 910.7; *see also State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999) ("Iowa Code section 910.7 permits an offender who is dissatisfied with the amount of restitution required by the plan to petition the district court for a modification. Until that remedy has been exhausted we have no basis for reviewing the issue that defendant raises.").

Smith should address his restitution challenge to the district court. When he appealed, the district court had not yet determined the amount of attorney fees or his reasonable ability to repay that amount. Since filing his appeal, the district court has entered a restitution plan of payment, but Smith has not exhausted his duty to challenge that plan with a 910.7 hearing. Therefore, this Court should decline to review the restitution plan on direct appeal.

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mootness. We consider matters that have transpired during the appeal for this limited purpose.").

III. Smith's Suspended Fine for His Habitual Offender Conviction Should Be Vacated.

Preservation of Error

"Illegal sentences may be challenged at any time, notwithstanding that the illegality was not raised in the trial court or on appeal." *State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010)

Standard of Review

Review of the legality of a sentence is for errors at law. *See State v. Davis*, 544 N.W.2d 453, 455 (Iowa 1996).

Discussion

At the sentencing hearing for Smith's habitual offender conviction, the prosecutor informed the court that the proper sentence is "a fifteen year maximum sentence and with no statutory fine." Sent. Tr. p. 3, lines 20–25; *see also* Iowa Code § 902.9(1)(c) (providing no fine for a habitual offender). Smith's attorney asked "that the fines be suspended in this matter." Sent. Tr. p. 5, lines 20–24. The court's oral pronouncement of sentence purported to "waive any fines," but the written judgment imposed and suspended a $1,000 fine. Sent. Tr. p. 9, lines 9–10, Judgment (1/16/2018); App. 11. Because the fine was not permitted by statute, the State agrees this Court should vacate the fine.

CONCLUSION

The Court should affirm Bernard Smith's conviction and sentence, but vacate only the portion of his sentence imposing a fine.

REQUEST FOR NONORAL SUBMISSION

The State agrees this case should be submitted without oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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) or (2) because:

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Dated: September 24, 2018

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