

IN THE COURT OF APPEALS OF IOWA

No. 1-312 / 10-1859
Filed June 29, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GRANT WAYNE WILSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Sioux County, Robert J. Dull,
District Associate Judge.

A defendant appeals his sentence for operating while intoxicated, third
offense, in violation of Iowa Code section 321J.2 (2009). **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David A. Adams, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant
Attorney General, Coleman McAllister, County Attorney, and Jared Weber,
Assistant County Attorney, for appellee.

Considered by Vogel, P.J., Vaitheswaran, J., and Mahan, S.J.* Tabor, J.,
takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

VOGEL, P.J.

Grant Wilson appeals from his sentence for operating while intoxicated as an habitual offender. He argues the habitual offender enhancement is illegal because a record of his prior convictions was not made as required by Iowa Rule of Criminal Procedure 2.19(9). Wilson does not argue the sentence was outside the statutory bounds and does not deny that he is an habitual offender. Therefore, as the record supports the application of the habitual offender enhancement, we find his sentence is not illegal. We further find Wilson did not preserve error on a procedural-error claim, which is subject to the normal rules of error preservation.

I. Background Proceedings.

Wilson was charged by trial information, as amended, with (Count I) operating while intoxicated (OWI), third or subsequent offense, in violation of Iowa Code section 321J.2 (2009); (Count II) operating a motor vehicle while license is barred as a habitual offender under sections 321.555 and 321.556, in violation of Iowa Code sections 321.560 and 321.561; and (Count III) driving while license was denied or revoked under chapter 321J, in violation of Iowa Code section 321J.21. The trial information alleged that Wilson had five previous OWI convictions, which occurred in 2000, 2001, 2005, 2007, and 2009. It also alleged he was an habitual offender having been convicted of three prior felonies—third degree burglary in South Dakota in 1983, sexual contact with a child under the age of sixteen also in South Dakota in 1994, and failure to comply with the sex offender registry in Iowa in 2005. See Iowa Code § 902.8 (providing

that an habitual offender is any person convicted of a class C or D felony who has twice before been convicted of any felony in any state or federal jurisdiction).

On September 28, 2010, a jury found Wilson guilty of count I and Wilson pleaded guilty to counts II and III. Following the jury verdict, the following exchange occurred,

The Court: Let the record reflect the jury has left the courtroom. Counsel and . . . the defendant are present. With regard to the enhancing element for the prior convictions, do you—will you stipulate that or do you wish it to be so the jury—

Defense Counsel: We'll stipulate, Your Honor.

The Court: Just for purposes of the record, I note that the trial information alleges that you were convicted of the crime of Operating While Intoxicated, Second Offense, in Cherokee County, Iowa, on May 18th. Do you agree with that conviction sir?

The Defendant: Yes, sir.

The Court: It also shows you were convicted of the crime of Operating While Intoxicated, also in Cherokee County, on June 8th, 2007. Do you agree with that conviction?

The Defendant: Yes.

The Court: The Court will accept those admissions

The Prosecutor: Uh, the State would like to request the defendant's bond be revoked . . . now that he has been convicted of a habitual felony crime as well as an aggravated and serious misdemeanor.

On October 21, 2010, a sentencing hearing was held. A presentence investigation report had been completed, which set forth Wilson's prior criminal history that included the prior felony and OWI convictions. The following exchange occurred,

The State: . . . The State doesn't feel it's necessary for the Court to—to hear all of the, uh, defendant's prior convictions for OWI and . . . his three prior felonies as they are contained in the presentence investigation and were . . . admitted to at the conclusion of the jury trial.

The State's position as—is there is no reasonable reason, I guess, why the operating while barred conviction and the OWI should not be run consecutively, meaning that the 3-year to 15-year

sentence as a habitual felon would be run consecutive to the 2-year . . . possible prison term of the operating while barred.

. . . .
 Defense Counsel: . . . At this time, after the evidence was presented and the . . . end of the trial, we understand that this would be Mr. Wilson's third felony conviction. His two prior felonies were in 1993 and 1984, making the most recent one 16 years ago.

We ask that the prison time on the OWI charge be suspended and in lieu of that impose the prison sentence on the driving while license barred. . . . If the two years were imposed on the barred in lieu of the 15 on the . . . on the felony.

. . . .

The district court sentenced Wilson to a term of imprisonment not to exceed fifteen years on count one, a term of imprisonment not to exceed two years on count two, and one year in jail on count three. See Iowa Code § 902.9(3) ("An habitual offender shall be confined for no more than fifteen years."). The sentences on count one and two were to run consecutive to one another, and concurrent to count three. Wilson appeals and raises an illegal-sentence claim. Our review is for correction of errors at law. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002); *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001).

II. Illegal Sentence.

Wilson asserts that the district court erred by imposing an illegal sentence, arguing that habitual offender enhancement is illegal because a record of his prior convictions was not made as required by Iowa Rule of Criminal Procedure 2.19(9). The State responds that Wilson cannot raise an illegal-sentence claim because the record supports the application of the habitual offender enhancement and Wilson's sentence is within the statutory limits. The State further argues that Wilson's claim is governed by the normal rules of error preservation and he did not preserve error.

We first address whether Wilson's challenge to his sentence amounts to an attack on an illegal sentence.

An illegal sentence is one that is not permitted by statute. It is void and not subject to the usual concepts of waiver, whether from a failure to seek review or other omissions of error preservation. Because an illegal sentence is void, it can be corrected at any time. This court has applied these principles to an enhanced sentence entered under an erroneous conclusion that the defendant was a habitual offender.

State v. Gordon, 732 N.W.2d 41, 43 (Iowa 2007) (internal citations and quotations omitted). “[If] the habitual-offender statute does not apply, an enhanced sentence based on habitual-offender status is ‘not permitted by statute’ and is, therefore, illegal.” *Id.* at 44. Therefore, where the habitual-offender sentencing enhancement is not applicable and illegal, it may be challenged on direct appeal. *Id.*; *State v. Woody*, 613 N.W.2d 215, 217 (Iowa 2000).

In the present case, the trial information asserts that Wilson had three prior felony convictions. The minutes of testimony reveal the State was prepared to offer the testimony of the Cherokee County Iowa Clerk of Court and Lincoln County South Dakota Clerk of Court proving Wilson had three prior felony convictions. See *State v. McBride*, 625 N.W.2d 372, 375 (Iowa Ct. App. 2001). Following the jury trial, Wilson was asked whether he would stipulate to his prior convictions for *sentencing enhancement*, to which his counsel responded that he would stipulate. See *State v. Kukowski*, 704 N.W.2d 687, 692 (Iowa 2005) (explaining that following a jury verdict, the defendant may either affirm or deny his prior felony convictions). Nevertheless, Wilson was only questioned as to the specific OWI convictions. See *McBride*, 625 N.W.2d at 374–75 (“[T]rial courts

have a duty to ensure that defendants knowingly and voluntarily stipulate to having prior convictions.”). Although Wilson now argues he only stipulated as to his prior OWI convictions, the record does not indicate the stipulation was limited to only those prior convictions. During the sentencing hearing, the prosecutor referenced Wilson’s three prior felony convictions as contained in the presentence investigation. Defense counsel acknowledged the same, as well as the fifteen-year habitual-offender sentence. Wilson then declined to make any statements on the court’s offer of allocution.

Wilson does not argue that the sentence imposed was outside the sentence authorized by statute. The record clearly supports the habitual-offender status and Wilson did not at sentencing, nor does he now deny that he is an habitual offender with three prior felony convictions. *Cf. Gordon*, 732 N.W.2d at 43 (finding that where the defendant’s prior convictions were not sufficient to classify him as an habitual-offender, he could challenge the imposition of an habitual-offender status as an illegal sentence); *Woody*, 613 N.W.2d at 217 (same). “[T]he exclusion of illegal sentences from the principles of error preservation is limited to those cases in which a trial court has stepped outside the codified boundaries of allowable sentencing.” *State v. Hochmuth*, 585 N.W.2d 234, 237 (Iowa 1998).

The record demonstrates that Wilson’s prior convictions are sufficient to classify him as an habitual offender. Although a record was not made as

required by Iowa Rule of Criminal Procedure 2.19(9),¹ this is a procedural-error claim to which normal error preservation rules apply. See also *Kukowski*, 704 N.W.2d at 693–94 (explaining a district court’s abuse of discretion in not complying with rule 2.19(9) does not warrant relief unless it was prejudicial). In the present case, this claim was not preserved. We find Wilson’s sentence is not an illegal sentence and affirm.

AFFIRMED.

¹ Iowa Rule of Criminal Procedure provides in part, “[T]he offender shall have the opportunity in open court to affirm or deny that the offender is the person previously convicted, or that the offender was not represented by counsel and did not waive counsel.”