

**IN THE COURT OF APPEALS OF IOWA**

No. 2-868 / 12-0167  
Filed November 29, 2012

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**ROBERT G.D. ONSTOTT,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Linn County, Thomas L. Koehler (guilty plea) and Ian K. Thornhill (sentencing), Judges.

The defendant appeals the district court's judgment and sentence entered following his guilty plea to possession of marijuana (enhanced). **SENTENCE VACATED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Jason Burns, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Danilson and Mullins, JJ.

**MULLINS, J.**

Robert Onstott appeals the sentence entered upon the district court's judgment finding him guilty of possession of marijuana, enhanced for having one prior marijuana possession offense. For the reasons stated below, we find the district court erred by classifying the offense as a felony and as a result Onstott was subjected to an illegal sentence. The district court's sentence is vacated and remanded for resentencing.

**I. BACKGROUND AND PROCEEDINGS.**

On March 24, 2011, Onstott was charged with manufacturing methamphetamine, possession of marijuana (enhanced for a previous conviction), possession of drug paraphernalia, and driving while license suspended. While on pretrial release Onstott incurred additional charges and on April 27, 2011, was charged with attempting to elude, operating a motor vehicle without the owner's consent, possession of marijuana (enhanced), possession of drug paraphernalia, and driving while licensed suspended.

On November 17, 2011, pursuant to a plea agreement, Onstott entered guilty pleas to the March 24 charges of manufacturing methamphetamine and possession of marijuana (enhanced), and the April 27 charge of attempting to elude. During the plea colloquy the court recited the requisite elements for each offense and referred to possession of marijuana (enhanced), as a class "D" felony. The district court's order accepting the guilty pleas identified manufacturing methamphetamine as a class "C" felony and attempting to elude

as a class “D” felony. As in the plea colloquy, the order identified possession of marijuana (enhanced), as a class “D” felony.

On January 24, 2012, Onstott was adjudged guilty of the three counts. He was sentenced to an indeterminate term of ten years for the manufacturing methamphetamine offense, and an indeterminate term of five years for the attempting to elude offense. The sentencing court, having also classified the enhanced possession of marijuana charge as a class “D” felony, sentenced Onstott to an indeterminate term of five years and a fine of \$750 for that offense. All sentences were to run concurrently. This appeal followed.

## **II. SCOPE AND STANDARD OF REVIEW.**

Review of challenges to the legality of a sentence is for errors at law. *State v. Sisk*, 577 N.W.2d 414, 416 (Iowa 1998). An illegal sentence may be corrected at any time. *Id.* “Generally, issues not raised in the trial court may not be raised for the first time on appeal.” *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). However, a defendant challenging a sentence as void, illegal or procedurally defective does not need to object in the district court to preserve error. *Id.*

## **III. INCORRECT CLASSIFICATION OF OFFENSE.**

The penalty for possession of marijuana is enhanced if the offender has a previous conviction for possession of marijuana. Iowa Code § 124.401(5) (2011). The relevant range of punishment is provided in section 903.1(1)(b). *Id.* This section reads, “[f]or a serious misdemeanor, there shall be a fine of at least three hundred fifteen dollars but not to exceed one thousand eight hundred

seventy-five dollars. In addition, the court may also order imprisonment not to exceed one year.” Iowa Code § 903.1(1)(b) (2011). Thus, possession of marijuana by a person with a previous conviction for possession of marijuana is classified as a serious misdemeanor. In the present case, Onstott pleaded guilty to the serious misdemeanor of possession of marijuana, second offense, but the plea colloquy, judgment entry and sentence all incorrectly classified this offense as a D felony. Accordingly, Onstott was sentenced to an indeterminate term of five years for this offense and fined \$750. The term of imprisonment exceeds that which is statutorily authorized for a serious misdemeanor.

Onstott has challenged his guilty plea for possession, enhanced, as void for lacking a factual basis, and he seeks dismissal of the charge. To be adjudged guilty of the charge, Onstott needed to have “(1) exercised dominion and control over the contraband, (2) had knowledge of its presence, and (3) had knowledge that the material was a controlled substance.” *State v. Bash*, 670 N.W.2d 135, 137 (Iowa 2003). The penalty enhancement required that the substance possessed be marijuana and that Onstott had previously been convicted of possession of marijuana. Iowa Code § 124.401(5). Onstott admitted he was in possession of marijuana, knew it was marijuana and knew that it was an illegal substance. He also admitted that he had previously been convicted of possession of marijuana. Thus, the record contains a factual basis for adjudging Onstott guilty of a violation of section 124.401(5). Onstott’s claim to the contrary is without merit.

As a by-product of his factual basis challenge, Onstott asserts the trial court did not properly inform him of the consequences of failing to file a motion in arrest of judgment, or in the alternative, if he was properly informed, that his trial counsel was ineffective for allowing him to plead guilty to an offense for which there was no factual basis. Because the record reveals a factual basis for Onstott's guilty plea, we need not address Onstott's failure to file a motion in arrest of judgment.

Onstott also challenges the legality of his sentence on the marijuana conviction, and requests that it be vacated and the case remanded for resentencing. When a court imposes a sentence that is not authorized by law, the sentence is illegal, void, and will be vacated. *State v. Carney*, 584 N.W.2d 907, 910 (Iowa 1998). "In criminal cases, where an improper or illegal sentence is severable from the valid portion of the sentence, we may vacate the invalid part without disturbing the rest of the sentence." *State v. Keulta*, 798 N.W.2d 731, 735 (Iowa 2011). Onstott does not challenge his sentences for manufacturing methamphetamine and attempting to elude. His five-year sentence for possession (enhanced), as a "D" felony is illegal and must be vacated, and the case remanded for resentencing.

#### **IV. CONCLUSION.**

For the reasons stated above, the district court's sentence for possession of marijuana (enhanced) is vacated and this case is remanded for resentencing.

**SENTENCE VACATED AND REMANDED.**