

IN THE COURT OF APPEALS OF IOWA

No. 9-030 / 98-596

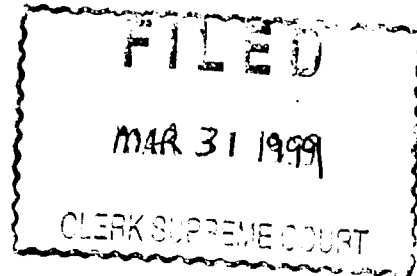
STATE OF IOWA,

Appellee,

vs.

KELVIN LYNELL SCOTT,

Appellant.



Appeal from the Iowa District Court for Black Hawk County, L.D. Lybbert,
Judge.

Kelvin Scott appeals from the judgment and sentence entered upon his guilty
plea to delivery of a controlled substance. **SENTENCE VACATED IN PART AND
REMANDED FOR PARTIAL RESENTENCING.**

Linda Del Gallo, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Kimberly A. Griffith, Assistant
County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel, and Zimmer, JJ.

ZIMMER, J.

Defendant Kelvin Lynell Scott appeals from judgment and sentence entered upon his guilty plea to delivery of a controlled substance (cocaine base), in violation of Iowa Code section 124.401(1)(c) (1993). We vacate in part his sentence and remand.

In 1993, defendant was charged by trial information with delivery of a controlled substance (cocaine base). Defendant entered a guilty plea to the charge and on April 20, 1994 he was sentenced to serve a term not to exceed ten years and was fined \$1,000.00. His sentence was suspended and as a condition of probation, Scott was required to reside in a residential facility. Defendant violated the conditions of his probation and in March 1995 his probation was revoked. Thereafter, Scott was ordered to serve the term of incarceration originally imposed. Scott was paroled before completing his sentence. He subsequently filed an application for postconviction relief. In October 1997, Scott's application was granted based on concerns regarding his mental competency at the time of his plea. His guilty plea was set aside, the original charge was reinstated, and Scott was remanded to the custody of the Black Hawk County Sheriff pending trial.

Scott pleaded guilty as charged on March 16, 1998, the day before his trial was to commence. His plea was entered pursuant to Rule 9 of the Iowa Rules of Criminal Procedure. In exchange for pleading guilty to the delivery charge, it was agreed defendant would be given credit for all time served and be deemed to have fully satisfied the indeterminate ten year sentence imposed by the court. The district court

accepted the plea agreement but, stating its belief it had no authority to do otherwise, imposed a \$1000 fine.

Defendant appeals. He argues the trial court erroneously believed it did not have discretion to suspend the fine it imposed. He further contends he received ineffective assistance of counsel after his original sentence was set aside. He complains counsel made no pretrial motions other than for a competency evaluation, conducted no discovery, and failed to get him promptly tried, thereby coercing him into entering his guilty plea.

I. Imposition of the fine. Our review is for correction of errors of law. *See* Iowa R. App. P. 4; *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). While a court need not give specific reasons for rejecting a sentencing option, the record must reveal the sentencing court in fact exercised discretion with regard to the options it had. *See State v. Thomas*, 547 N.W.2d at 225. We will overturn a sentence imposed by a trial court only where there has been an abuse of discretion. *Id.*

The following conversation occurred between defendant's attorney and the court during the plea and sentencing hearing:

MR. ZELLHOEFER: There's one thing we didn't mention. In Mr. Scott's original sentence there was the mandatory minimum fine of \$1000, and I don't think that can be waived.

* * *

THE COURT: Well, I'll put the fine in there because I'm required to. . . .

The State concedes the language of defense counsel and of the sentencing court suggests both believed the court was required to impose a statutorily mandated minimum fine of at least \$1000 which could not be suspended. Section 124.401(1)(c) states that a fine of not less than \$1000 shall be imposed, thereby eliminating the sentencing court's power to avoid imposing any fine.¹ However, the language in section 124.401(1)(c) establishing a minimum fine does not remove the Court's authority to suspend the fine. *Cf. State v. Grey*, 514 N.W.2d 78, 79 (Iowa 1994) (holding similar language in section 124.401(1)(d) establishing a minimum fine does not remove the court's authority to suspend the fine); *State v. Spivie*, 581 N.W.2d 205, 209 (Iowa App. 1998).

“Where a court fails to exercise the discretion granted it by law because it erroneously believes it has no discretion, a remand for resentencing is required.” *State v. Lee*, 561 N.W.2d 353, 354 (Iowa 1997) (citing *State v. Washington*, 356 N.W.2d 192, 197 (Iowa 1984)). Because defendant does not challenge any other part of the sentence, the portion imposing a \$1000 fine should be vacated and a remand ordered for resentencing on this issue. *Id.* (citing *State v. Krivolavy*, 258 N.W.2d 157, 158 (Iowa 1977)). We do not retain jurisdiction.

II. Ineffective Assistance of Counsel. Defendant argues he received ineffective assistance of counsel during the time leading up to his second trial.

¹ Iowa Code section 124.401(1)(c) reads in pertinent part:

c. Violation of this subsection . . . shall be punished by a fine of not less than one thousand dollars nor more than fifty thousand dollars . .

To demonstrate ineffective assistance of counsel, one must show “under the entire record and totality of the circumstances” his attorney’s performance was not “within the normal range of competence.” *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). One must show his lawyer failed to perform an essential duty, and that such failure resulted in prejudice. *See State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997).

Ineffective assistance of counsel claims raised on direct appeal are reviewed de novo. *See State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Generally, however, we do not review claims of ineffective assistance of counsel on direct appeal. *See State v. Kinkead*, 570 N.W.2d 97, 102 (Iowa 1997). Postconviction proceedings are preferred because they allow development of a more adequate record of the claim and afford the attorney charged with providing ineffective assistance an opportunity to respond. *Id.* We find the existing record is inadequate to properly address the merits of defendant’s claim.

**SENTENCE VACATED IN PART AND REMANDED FOR PARTIAL
RESENTENCING.**