

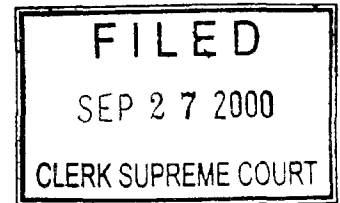
IN THE COURT OF APPEALS OF IOWA

No. 0-420 / 99-1506
Filed September 27, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHRISTOPHER DAVID RICKETTS,
Defendant-Appellant.



Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower, Judge.

Ricketts appeals from the judgment and sentence entered upon his guilty plea to possession of more than five grams of methamphetamine with intent to deliver within one thousand feet of a school and as a second offender, possession of marijuana with intent to deliver within one thousand feet of a school and as a second offender, and possession of hash oil. **SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Mahan and Zimmer, JJ.

HUITINK, P.J.***I. Introduction.***

Christopher Ricketts appeals from the judgment and sentence entered upon his guilty plea to possession of more than five grams of methamphetamines with intent to deliver within 1000 feet of a school and as a second offender in violation of Iowa Code section 124.401(1)(b), 124.401A, and 124.411 (1999), possession of marijuana with intent to deliver within 1000 feet of a school and as a second offender in violation of sections 124.401(1)(d), 124.401(1)(c), 124.401A, and 124.411, and possession of hash oil in violation of section 124.401(5). Ricketts argues the court improperly considered the implications of his parole eligibility in the selection of the sentence imposed. Ricketts also contends trial counsel was ineffective for allowing him to be sentenced to an enhanced penalty of five years on the charge of possession of marijuana with intent to deliver. Because we conclude the sentencing judge improperly considered Ricketts's eligibility for parole and good and honor time credits, we vacate Ricketts's sentence and remand for resentencing.

II. The Merits.

The imposition of a sentence is generally within the discretion of the trial court and will be disturbed only upon a showing of abuse of discretion. *State v. Garrow*, 480 N.W.2d 256, 259 (Iowa 1992). An abuse of discretion will be found only when the discretion is exercised on grounds that are clearly untenable or to an extent clearly unreasonable. *State v. Johnson*, 476 N.W.2d 330, 335 (Iowa 1991). The use of an impermissible sentencing factor is viewed as an abuse of

discretion and requires resentencing. *State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983); *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa App. 1994).

In the absence of a statute mandating a particular sentence, it is the court's prerogative to determine whether a sentence of confinement will be imposed, suspended, or deferred. See Iowa Code § 901.5 (1999); *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). It is also the court's prerogative to determine the maximum length of the defendant's sentence. See *State v. Stakenburg*, 215 N.W.2d 265, 267 (Iowa 1974). Under Iowa's correctional scheme, however, it is the parole board's prerogative to determine the minimum length of the defendant's sentence. See *State v. Remmers*, 259 N.W.2d 779, 785 (Iowa 1977). The minimum length of the defendant's sentence is also subject to legislative and department of corrections policies concerning good and honor time as well as other credits a defendant may earn against his sentence. See Iowa Code § 903A.2; *Bradham v. State*, 480 N.W.2d 28, 29 (Iowa 1992).

A sentencing court abuses its discretion by deliberately lengthening a defendant's sentence to avoid the implications of the defendant's parole eligibility. *Remmers*, 259 N.W.2d at 785; *State v. Hulbert*, 481 N.W.2d 329, 335 (Iowa 1992). This limitation on sentencing court discretion finds its origins in judicial deference to the prerogatives of other branches of government empowered to determine the minimum length of a defendant's sentence. *Remmers*, 259 N.W.2d at 785.

The gist of Ricketts's argument is that the court considered and rejected more lenient sentencing options in part based on speculation concerning his

parole eligibility and the anticipated reduction of his sentence by good and honor time credits. Ricketts cites the following comments made by the judge at sentencing.

The . . . real determination the Court has to make is about how long you should serve before you're paroled. If I run your sentences concurrent and don't impose the five years and don't triple the sentence, you have a twenty-five year sentence. [F]rom what I know about the new Code section (meaning § 901.10), it seems that there's no exclusion on a second offender, so I'm going to end up reducing it, and whether that's appealed by the State, I don't know, but if I give you a twenty-five year sentence, there's a mandatory one-third, which is eight years. That can be reduced down to approximately five years by reducing the third a third and given good and honor time. On top of that you have about two-and-a-half years in prison, and for what you've done over the past four years [that would be] painfully inadequate. If I reduce it to twenty-five years with the mandatory minimum one-third, that's eighty years, a third off of that is . . . approximately two-and-a-half years

If I give you a seventy-five year sentence you have a mandatory minimum twenty-five years, take a third off that, you have sixteen years, and you . . . get good and honor time on that, you're looking at somewhere between seven and eight years, which seems to me to be painfully inadequate for what's been going on with all the drugs that you've been selling and all the lives that you've destroyed, including your own, so the Court enters the following order.

It is hereby the order of this Court that you are guilty of the crimes of Possession With Intent to Deliver Methamphetamine, More than Five Grams Within a Thousand Feet of a School and Being a Second Offender; Possession of Marijuana With the Intent to Deliver Within a Thousand Feet of a School and Being a Second Offender; and Possession of Hash Oil. You are sentenced under Section 124.401A, 124.411, 124.401(1), 124.401(1)(b), 124.401B, 124.401(1)(d), 124.401(5), 902.9 and 903.1 to be confined for ninety days on Count III. You'll be given credit for ninety days previously served. And you're to pay a \$250 fine in Count III, plus a 30 percent surcharge and court costs. On Count 1 you're to pay the minimum fine of \$5,000, and Count II, \$1,000, plus a 30 percent surcharge and court costs.

You're to be confined for a term not to exceed ninety years on Count I and thirty years on Count II. Those sentences are concurrent. The one-third mandatory minimum applies. The Court under 901.10(2) will reduce that by an additional third.

So what you come out, sir, with is . . . approximately ten years.

According to the State's interpretation of these comments, the sentencing judge did not consider parole policy or otherwise interfere with the parole board's prerogatives. The State argues the record reflects no more than the judge's comparison of the resulting sentences under any of several sentencing options. We disagree.

The State's interpretation ignores the judge's express reference to parole and good and honor time credits. Although the sentencing judge made the comparisons cited, his calculations of Ricketts's minimum sentence specifically implicated the prerogatives of both the parole board and the department of corrections. The relative degree to which these factors were determinative of the sentence imposed is inconsequential to our review. *State v. Remmers*, 257 N.W.2d at 284. It is sufficient for us to find that this "improper sentencing factor crept into the record." *Id.* We accordingly conclude the judge abused his sentencing discretion by basing the sentence imposed on a stated desire to lengthen Ricketts's minimum sentence.

The sentence imposed by the district court is therefore vacated, and this matter is remanded for resentencing. Because this determination is dispositive, we need not address Ricketts's ineffective assistance of counsel claim.

SENTENCE VACATED AND REMANDED FOR RESENTENCING.