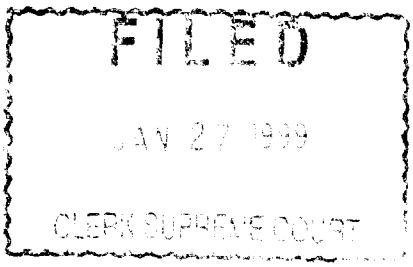
IN THE COURT OF APPEALS OF IOWA

No. 8-694 / 97-1811
Filed January 27, 1999



STATE OF IOWA,
Appellee,

vs.

SETH GRAHAM DUDLEY,
Appellant.

Appeal from the Iowa District Court for Johnson County, David M. Remley, Judge.

On appeal from his convictions for aiding and abetting false imprisonment, assault causing bodily injury, and assault with intent to cause serious injury, Seth Dudley claims the sentencing court erred in sentencing him to jail and to a community based correctional facility. **JUDGMENT OF CONVICTION AFFIRMED, SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Christine Boyer, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, J. Patrick White, County Attorney, and Janet Lyness, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ. Zimmer, J., takes no part.

HUITINK, P.J.

Seth Dudley appeals from his convictions for aiding and abetting false imprisonment, assault causing bodily injury, and assault with intent to cause serious injury. We affirm the judgment of conviction, but vacate the sentences and remand for resentencing.

I. Background Facts and Proceedings.

Seth Dudley pled guilty to aiding and abetting false imprisonment, and assault causing bodily injury, both serious misdemeanors, and assault with intent to cause serious injury, an aggravated misdemeanor.

Dudley was sentenced to concurrent 270 day sentences in the county jail on the serious misdemeanor charges. He was also ordered to pay the mandatory minimum $250 fine for both serious misdemeanor charges. With respect to the aggravated misdemeanor charge, Dudley was sentenced to an indeterminate term not to exceed two years. This sentence was to be served consecutive to the sentences imposed on the serious misdemeanor charges.[1] The district court suspended the aggravated misdemeanor sentence, and ordered Dudley to reside for up to one year in Hope House, a community-based residential correctional facility, as a condition of his probation. Additionally, on the aggravated assault charge, the court imposed a $500 fine which it referred to as mandatory.

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[1] Dudley was committed to the custody of the director of the Iowa Department of Corrections for this portion of his sentence.

Dudley appeals. He asserts three bases of error in the district court's sentencing decision: (1) the court imposed an illegal sentence by not committing him to the department of corrections when his sentences of confinement exceeded one year in length; (2) the court erred in sentencing him to a simultaneous term of jail and probation on the aggravated misdemeanor charge; and (3) the court failed to exercise its discretion in imposing a fine on the aggravated misdemeanor charge under Iowa Code section 903.1.

II. Standard of Review.

We review the court's sentence for correction of errors at law. *State v. Kapell*, 510 N.W.2d 878, 879 (Iowa 1994).

III. Imposition of Sentence.

A. Place of Confinement.

Dudley asserts the district court erred by designating the county jail as the place of confinement for his consecutive terms of incarceration, which together totaled over one year of imprisonment. *See* Iowa Code §§ 901.8, 903.4 (1997). The State maintains there was no error because the district court suspended part of Dudley's sentence and imposed probation in lieu of confinement. In light of the supreme court's recent decision in *State v. Patterson*, 586 N.W.2d 83 (Iowa 1998), we agree with Dudley, affirm the judgment, but vacate the sentence and remand for resentencing.

The district court sentenced Dudley to two concurrent one-year sentences in the Johnson County Jail for the two serious misdemeanor charges. It also sentenced him to an indeterminate two-year period of incarceration for the aggravated misdemeanor charge, to be served consecutively with the other sentences. The court suspended the sentence for the aggravated misdemeanor and placed Dudley on probation for two years.

We hold the district court erred in not designating the proper place of confinement. *See* Iowa Code §§ 903.4, 901.8. When Dudley's consecutive sentences are added together, as required by section 901.8, they total 1000 days. This exceeds the one-year period referred to in section 903.4. Under section 903.4, Dudley's sentences should be served in the custody of the director of the department of corrections.

Under the rule announced in *Patterson*, the fact the district court suspended the consecutive sentence does not alter its character as a sentence of confinement. *Patterson*, 586 N.W.2d at 84. Under the sentencing scheme, Dudley will not be actually confined unless his probation is revoked. The district court, however, still must designate the proper place of confinement in the event his probation is revoked. The proper place of confinement was in the custody of the director of the department of corrections.

B. Imposition of Fine for Aggravated Misdemeanor.

Dudley contends the district court erred in imposing what it termed to be a mandatory fine of $500 for the aggravated misdemeanor count. As we are remanding this cause for resentencing in its entirety, we make no determination of whether the district court exercised its discretion in imposing the fine for the aggravated misdemeanor count. We note, however, Iowa Code section 903.1(2), the sentencing provision at issue, does not contain "express language eliminating the sentencing court's authority to suspend a fine." *State v. Ayers*, ___ N.W.2d ___, ___ (Iowa 1999). The absence of such language means the legislature did not intend to eliminate the sentencing option of suspending the fine for aggravated misdemeanants. *Id.* Therefore section 903.1(2) "must be read in *pari materia* with the Code's general sentencing provisions." *State v. Chana*, 476 N.W.2d 38 (Iowa 1991); *see also State v. Hildebrand*, 280 N.W.2d 393, 397 (Iowa 1979)(the use of the word "shall" in a sentencing statute does not require the trial court to impose a jail sentence; rather the court must exercise its discretion in deciding whether to impose the minimum sentence).

We have considered Dudley's argument that the district court improperly sentenced him to a simultaneous term of probation and incarceration with regard to the portion of his sentence at Hope House, a community-based residential correctional facility under the Sixth Judicial District Department of Corrections. We find his position to be without merit. *See* Iowa Code § 907.3(3); *State v. Tensley*, 334 N.W.2d

764, 764-65 (Iowa 1983)(sentencing court may place defendant on probation upon such terms and conditions as it may require including commitment to a community correctional residential treatment facility).

We affirm the judgment entered upon Dudley's convictions, but vacate his sentences and remand for resentencing. We do not mean by this decision to suggest what the new sentence should be.

JUDGMENT OF CONVICTION AFFIRMED, SENTENCE VACATED AND REMANDED FOR RESENTENCING.