

450

FILED

DEC 27 1979

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	Filed December 27, 1979
vs.	)	
LEE ANDREW SMITH,	)	
	)	<u>288</u>
Defendant-Appellant.	)	63078

Appeal from Black Hawk District Court - Roger F. Peterson, Judge.

Defendant appeals conviction of escape in violation of section 719.4(1), supplement to the Code 1977, and sentencing as an habitual offender under sections 902.8 and 902.9(2), supplement to the Code 1977. - Conviction affirmed; remanded for resentencing.

Michael E. Sheehy, Waterloo, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Douglas F. Staskal, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant appeals his conviction of escape in violation of section 719.4(1), supplement to the Code 1977, and his sentencing as an habitual offender under sections 902.8 and 902.9(2), supplement to the Code 1977. We affirm defendant's conviction, but remand for resentencing.

I. Defendant contends the trial court erred in denying his motion for a directed verdict, on the ground that the applicable code section under which defendant should have been charged was section 719.4(3), supplement to the Code 1977, rather than section 719.4(1). In reviewing a trial court's ruling on a directed verdict, we view the evidence in the light most favorable to the State, whether or not it is contradicted, and every reasonable inference that can be deduced from the evidence must be considered to support and supplement that evidence. State v. Jones, 281 N.W.2d 13, 18 (Iowa 1979); State v. Overstreet, 243 N.W.2d 880, 883 (Iowa 1976). If there is any substantial evidence tending to support the charge, the case should be submitted to the jury. State v. Dykers, 239 N.W.2d 855, 859 (Iowa 1976); State v. Sheffey, 234 N.W.2d 92, 96 (Iowa 1975).

Defendant argues that subsection (3) more appropriately applies to his action of failing to return to a work release center, whereas subsection (1) only applies to escape from an institutional prison. Defendant's argument is without merit. Subsection (1) applies not only to institutions, but to "any detention facility" which would clearly include work release centers.

The State's evidence established that defendant had been convicted of a felony, and had left the work release center intentionally and without permission. The elements of the crime of escape under section 719.4(1), supplement to the Code 1977 thus being established, the trial court properly denied defendant's motion for a directed verdict.

II. Defendant was sentenced as an habitual offender under sections 902.8 and 902.9(2), supplement to the Code 1977. Defendant does not deny his status as an habitual offender, but alleges that the habitual offender statutes are unconstitutional under the fifth amendment double jeopardy prohibition.

The rationale underlying Iowa's habitual offender statute is "to more severely punish those incorrigible offenders who have not responded to the restraining influence of conviction and incarceration." State v. Robinson, 262 N.W.2d 270, 271 (Iowa 1978). Section 247.1, The Code 1973, the prior habitual offender statute, has been upheld against constitutional attack. State v. Kramer, 235 N.W.2d 114, 117 (Iowa 1975). Since defendant did not contend that sections 902.8 and 902.9, supplement to the Code 1977 are significantly distinguishable from the prior statute, we deem that Kramer controls the disposition of defendant's constitutional attack, and we hold that sections 902.8 and 902.9, supplement to the Code 1977, are not unconstitutional. Furthermore, we believe the rationale of Robinson expressed above is sufficient to uphold the habitual offender statutes against attack on double jeopardy grounds.

III. Finally, defendant contends that the trial court erred in sentencing him to a fifteen year term under the habitual offender statute, section 902.9, supplement to the Code 1977, pursuant to the retroactive application of section 901.8, The Code 1979.¹ That section provides, in pertinent part: "If a person is sentenced for escape under section 719.4 or for a crime committed while confined in a detention facility or penal institution, the sentencing judge shall order the sentence to begin at the expiration of any existing sentence." The trial judge interpreted that provision to preclude the exercise of any discretion with regard to whether defendant's sentence as an habitual offender could run consecutively or concurrently with his existing sentence, since the charge that gave rise to the habitual offender provision was that of escape under section 719.4, supplement to the Code 1977. Consequently, the trial judge concluded that he was required to give defendant a consecutive sentence.

We conclude that such an interpretation was error. The pertinent provision of section 901.8 only applies to a person "sentenced for escape under section 719.4 or for a crime committed while confined in a detention facility or penal institution..." Defendant, however, was sentenced as an habitual offender, which is not specifically addressed by the language of section 901.8. Sentencing as an habitual offender does not involve sentencing for escape under section 719.4. Neither does it involve sentencing

¹ This section was applied retroactively to persons sentenced on or after January 1, 1978, pursuant to 1978 Session, 67th G. A., ch. 1091, § 5.

- 3 -

for a crime committed while confined in a detention facility or penal institution, since the status of being an habitual offender is not in and of itself a criminal act that can be committed by an incarcerated individual. The general rule in Iowa is that penal statutes are to be construed strictly and all doubts are to be resolved in favor of the accused, Davis, 271 N.W.2d at 695 (quoting Knight v. Iowa District Court of Story County, 269 N.W.2d 430, 432 (Iowa 1978)). We do not think that the provision was intended to apply to a defendant whose sentence for escape was enhanced by virtue of his being convicted as an habitual offender since to do so would be to take away the trial court's sentencing discretion, and require it to enhance an already enhanced penalty by running it consecutively with defendant's existing sentence. It appears that the basis for misinterpretation is the absence of a specific delineation of the applicability of section 901.8 to a defendant sentenced as an habitual offender—a matter that should be clarified by the legislature. Consequently, the trial court erred when it interpreted the legislative provision to require it to give defendant a consecutive sentence. We do not hold that the trial court may not give defendant a consecutive sentence; only that it was error for the trial court to conclude that it had no discretion in the decision to so sentence this defendant. Therefore, we remand this case to the trial court for resentencing.

CONVICTION AFFIRMED; REMANDED FOR RESENTENCING.

Donielson and Carter, JJ., dissent.

DONIELSON, J. (dissenting)

I dissent from the majority's remand of this case for resentencing. The majority's reading of section 901.8, The Code 1979, does not comport with the clear statutory language. The trial court had no discretion under this statute regarding whether defendant's sentence should be consecutive or concurrent with his existing sentence.

Section 901.8, The Code 1979, provides in pertinent part: "If a person is sentenced for escape under section 719.4 or for a crime committed while confined in a detention facility or penal institution, the sentencing judge shall order the sentence to begin at the expiration of any existing sentence." Although defendant was sentenced under section 902.9, Supplement to the Code 1977, not section 719.4, The Code 1979, he was sentenced "for a crime committed while confined in a detention facility or penal institution" It would seem clear that section 901.8, The Code 1979, directly controls sentencing of defendant.

In adopting its view, the majority believes the consecutive sentencing provision for violation of section 719.4, The Code 1979, was not intended to apply to a defendant whose sentence for escape was enhanced by being sentenced as a habitual offender. This interpretation, however, leads to an unreasonable result. Under the majority's view, a defendant convicted of escape and sentenced under the habitual offender statute, with its harsher sentencing, could receive a less harsh penalty than a similarly convicted defendant not sentenced as a habitual offender. Such a result distorts the purposes of the habitual offender sentencing statute and section 901.8, The Code 1979. See State v. Robinson, 262 N.W.2d 270, 271 (Iowa 1978). Further, the majority's interpretation, unfortunately, undermines the deterrence of the sentencing structure of section 901.8, The Code 1979, for habitual offenders—a group without an apparent need for special beneficial treatment.

I would affirm the trial court's judgment.

Carter, J., joins in this dissent.