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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

489

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
TYRONE WILSON,) 9-107
88-623
Defendant-Appellant.)

Appeal from the Iowa District Court for Webster County (CR-155]4-12-87 & CR-06-01-88), Louis F. Beisser, Judge.

Defendant appeals the sentence pronounced by the trial court following his conviction, by plea of guilty, to a charge of second-degree robbery and attempted burglary in the second degree. **SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

William L. Wegman, State Public Defender, and Raymond E. Rogers, Assistant State Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Amy M. Anderson , Ass istant Attorney General , for plaintiff-appellee.

Considered by Oxberger, C.J., and Schlegel and Sackett, JJ. Habhab, J., takes no part.

SCHLEGEL, J. 490

Defendant, Tyrone Wilson, appeals the sentence entered by the trial court following his conviction, by plea of guilty, to a charge of second-degree robbery and attempted burglary in the second degree. Wilson allegedly possessed a firearm at the time of the crime. Wilson contends that he did not possess a weapon at the time of the crime, but admits that his codefendant did. At sentencing, the court explained to Wilson that because of the presence of the weapon, either in the possession of Wilson or his accomplice, the law required that Wilson serve not less than five years, pursuant to the provisions of Iowa Code section 702.11 (1987).

Defendant's sole claim on appeal is that the court failed to exercise its discretion in automatically imposing a five-year minimum sentence for the use of a firearm. We vacate the sentence and remand for resentencing.

Section 901.10 provides as follows:

> A court sentencing a person for the person's first conviction under section 204.406, 204.413, or 902.7 may, at its discretion, sentence the person to a term less than provided by the statute if mitigating circumstances exist and those circumstances are stated specifically in the record. However, the state may appeal the discretionary decision on the grounds that the stated mitigating circumstances do not warrant a reduction of the . . . sentence.

Iowa Code Section 902.7 provides:

> At the trial of a person charged with participating in a forcible felony, if the trier of fact finds beyond a reasonable doubt that the person is guilty of a forcible felony and that the person represented that the person was in the immediate possession and control of a firearm,

> displayed a firearm in a threatening manner, or was armed with a firearm while participating in the forcible felony the convicted person shall serve a minimum of five years of the sentence imposed by law. A person sentenced pursuant to this section shall not be eligible for parole until the person has served the minimum sentence of confinement imposed by this section.

Wilson does not dispute his eligibility for the enhanced sentence prescribed by section 907.2, but claims that the court should have given reasons why he should receive that sentence, and that the court was mistakenly of the opinion that it had no discretion in the matter.

Wilson cites to our case of State v. Beaver, 429 N.W.2d 778, 779-80 (Iowa App. 1988), in support of his argument that the court, having discretion in the matter, was required to state its reasons for imposing the full minimum sentence. It is not clear from the record whether the court was aware that it had the discretion pursuant to section 901.10 to impose a lesser sentence than that imposed by section 902.7, since at sentencing, the record appears that it felt it lacked that discretion. However, as we did in State v. Beaver, 429 N.W.2d at 780, we conclude the court had such discretion.

From the record, it is clear that the court was very specific in giving its reasons for the general sentence pronounced. The court responded to the recommendations of both the prosecutor and the defense counsel in imposing concurrent sentences (for second-degree robbery and for attempted burglary in the second degree) and carefully explained that the defendant would not be eligible for

parole until he had served at least five years of the sentence.

The State argues that section 901.10 should be interpreted to require the defendant to make a record of mitigating circumstances to allow the court to determine whether those circumstances are sufficient to lessen the minimum sentence to be imposed under section 902.7. The State concludes that since there was no showing of mitigation, there was no reason for the court to make any record rejecting the lessening of the mandatory minimum sentence. In some circumstances, such an interpretation may well be appropriate, and we would likely hold that counsel will have an obligation to raise that issue in an appropriate case. In this case, however, we do not hold that the failure of counsel to raise the issue of mitigation under section 901.10 is ineffective assistance of counsel, as it is clear from the record that counsel was no more aware of the provisions of that section than was the court. Despite this, the record does show that counsel offered some mitigating evidence in favor of the defendant. Counsel stated that Wilson was just barely eighteen years of age, and that this was his first offense as an adult. He added that the crime was out of character for Wilson, who had had a record of property crimes as a juvenile, and that the crime here occurred after the two participants had used cocaine.

We hold that State v. Beaver, 429 N.W.2d 778, 779-80, controls in this situation. Two judges, three lawyers, and the two defendants considered the requirements of the mandatory sentence in the process of working out the plea bargain and the guilty plea and the sentencing. But for the provisions of section 901.10, the record shows that the court did an adequate job of explaining its reasons for the sentence. Unfortunately, the court's failure to consider Iowa Code section 901.10 requires that the sentence be vacated and the matter be remanded to the court for resentencing.

SENTENCE VACATED AND REMANDED FOR RESENTENCING.