IN THE COURT OF APPEALS OF IOWA

No. 1-426 / 00-0841
Filed August 29, 2001

STATE OF IOWA,
Plaintiff,

vs.

IOWA DISTRICT COURT FOR POLK COUNTY,
Defendant.

FILED
AUG 29 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

The State was granted certiorari review of a district court's sentencing decision. The State argues the district court did not have authority to waive the mandatory minimum sentence. **WRIT SUSTAINED; SENTENCE VACATED; AND CASE REMANDED FOR RESENTENCING.**

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, John P. Sarcone, County Attorney, and Daniel C. Voogt, Assistant County Attorney, for plaintiff.

Matthew M. Boles of Parrish, Kruidenier, Moss, Dunn, Montgomery, Boles & Gribble, L. L. P., Des Moines, for defendant.

Considered by Huitink, P.J., and Miller and Hecht, JJ.

HECHT, J.

The State was granted certiorari review of a district court's sentencing decision. The State contends the district court did not have authority to waive the mandatory minimum sentence. We sustain the writ; vacate the sentence; and remand for resentencing.

I. **Factual Background and Proceedings.** On November 16, 1999, the State charged Kevin Kulisky with two counts, conspiracy to manufacture methamphetamine and manufacturing methamphetamine, both in violation of Iowa Code section 124.401(1)(b)(7) (1997). Kulisky pled guilty to conspiracy to manufacture, a lesser offense, in violation of Iowa Code section 124.401(1)(c)(6). At the time of his plea, Kulisky was on probation for a prior conviction for possession of a controlled substance with intent to deliver in violation of Iowa Code section 124.401(1)(c)(6).

On April 11, 2000, the district court revoked Kulisky's probation for the prior conviction and imposed the original sentence. The court sentenced Kulisky to an indeterminate ten-year term of incarceration for the conspiracy conviction, waiving the one-third mandatory minimum sentence under Iowa Code section 124.413 (1999). The State filed a petition for writ of certiorari from the district court's sentencing order contending the court's waiver of the mandatory minimum term of incarceration was illegal and should be vacated since it was not the defendant's first conviction subject to section 124.413. Our supreme court granted the petition on September 11, 2000.

II. Standard of Review. A writ of certiorari lies where a lower board, tribunal, or court has exceeded its proper jurisdiction or otherwise has acted illegally. Iowa R. Civ. P. 306. Therefore, "we may examine only the jurisdiction of the district court and the legality of its actions." *Director of Iowa Dep't of Human Servs. v. Iowa Dist. Ct.*, 621 N.W.2d 189, 191 (Iowa 2001) (quoting *Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 678 (Iowa 1998)). Our review is at law. *Amro v. Iowa Dist. Ct.*, 429 N.W.2d 135, 140 (Iowa 1988).

III. Merits. The State contends the district court misconstrued Iowa Code sections 124.413 and 901.10 (1999) by failing to impose the mandatory one-third minimum sentence. Iowa Code section 124.413 provides in pertinent part that "[a] person sentenced pursuant to section 124.401, subsection 1, paragraph . . . '(c)' . . . shall not be eligible for parole until the person has served a minimum period of confinement of one-third of the maximum indeterminate sentence prescribed by law." Iowa Code § 124.413 (1999). Iowa Code section 901.10(1) provides:

> [a] court sentencing a person for the person's first conviction under section 124.406, 124.413, 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.

Iowa Code § 901.10(1) (1999). The State contends (1) waiver of the mandatory minimum sentence under section 901.10 is permitted only for a defendant's first conviction, and (2) Kulisky is ineligible for waiver of the mandatory minimum sentence because he has been sentenced twice under section 124.401(1)(c).

When the language of a statute is plain and clear, we are not permitted to look beyond its express terms. *State v. Maher*, 618 N.W.2d 303, 305 (Iowa 2000); *State v. Neary*, 470 N.W.2d 27, 29 (Iowa 1991). Iowa Code section 901.10 explicitly states the court has discretion to waive the mandatory minimum sentence required under section 204.413 (the predecessor of section 124.413) if it is the defendant's first conviction under the statute. *Neary*, 470 N.W.2d at 29 (holding defendant's felony conviction in another state did not remove 901.10 waiver since it was not a 124.401 conviction). Since Kulisky was previously convicted under section 124.401(1)(c) in 1998, we find the district court did not have discretion to waive the mandatory minimum sentence required under section 124.413, despite a finding of mitigating circumstances. Accordingly, we sustain the writ, vacate the sentence, and remand for resentencing.

Kulisky requests in the event the mandatory minimum sentence is imposed, he should be permitted to withdraw his guilty plea. He asserts his plea was not made freely, knowingly, and voluntarily, because he was unaware a one-third mandatory minimum sentence was required. Kulisky cites no authority for the proposition he should be permitted to withdraw his plea under the circumstances of this case. His brief does not cite record references supporting the contention his guilty plea was not made freely, knowingly, and voluntarily. Moreover, during the plea colloquy, Kulisky acknowledged his understanding the potential sentence involved a mandatory minimum sentence:

> THE COURT: Mr. Kulisky, you understand it's possible that you will have to serve your time on the original sentence and be given an additional ten years with a mandatory one-third on this new charge? Do you understand that?

DEFENDANT: Yes.
MR. BOLES: Do you have a question?
DEFENDANT: Yes, I understand.

Thus, the plea colloquy demonstrates defendant and counsel for both parties understood a one-third mandatory minimum sentence would be imposed upon a term of incarceration. Therefore, we reject Kulisky's request to withdraw his plea.

WRIT SUSTAINED; SENTENCE VACATED; AND CASE REMANDED FOR RESENTENCING.