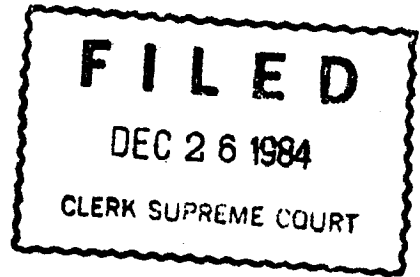


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed December 26, 1984'

593

vs.

)

STEVEN LEON TOBIN,

)

4-450

84-670

Defendant-Appellant.

)

Appeal from the Iowa District Court for Linn County - Larry J. Conney,
Judge.

Defendant appeals from his resentencing on convictions of six counts of false use of a financial instrument in violation of Iowa Code section 715.6 (1981) and the finding that he was an habitual offender under Iowa Code section 902.8 (1981). AFFIRMED.

Charles L. Harrington, Appellate Defender, and Patrick R. Grady, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Steven K. Hansen, Assistant Attorney General, for plaintiff-appellee.

Considered by Snell, P.J., and Schlegel and Hayden, JJ.

PER CURIAM

On October 6, 1982, defendant Steven Leon Tobin was convicted of six counts of false use of a financial instrument in violation of Iowa Code section 715.6 (1981), then classified as a class C felony. Defendant was also found to be an habitual offender pursuant to Iowa Code section 902.8 (1981); he was therefore sentenced as such on three of the counts. Defendant appealed. The court of appeals affirmed defendant's convictions but vacated the sentences and remanded the case for resentencing because the district court had not applied the habitual offender provision to all six counts. While defendant's appeal was pending, the legislature amended section 715.6 to reclassify false use of a financial instrument as an aggravated misdemeanor. At his resentencing, defendant asked the district court to apply the amendment and not sentence him as an habitual offender. The district court denied defendant's request because of the language of section 902.8; it sentenced defendant to a prison term of up to fifteen years, with a minimum of three years. Defendant has appealed from this resentencing.

The crux of defendant's argument is that because the amendment changes the penalty from a felony to an aggravated misdemeanor, he can no longer be convicted under the habitual offender statute. In considering the defendant's claim, we keep in mind that penal statutes are to be strictly construed. State v. Wiese, 201 N.W.2d 734, 737 (Iowa 1972).

Iowa Code 902.8 sets forth the minimum sentence for an habitual offender.

It provides:

902.8 Minimum sentence—habitual offender. An habitual offender is any person convicted of a class "C" or a class "D" felony, who has twice before been convicted of any felony in a court of this or any other state, or of the United States. An offense is a felony if, by the law under which the person is convicted, it is so classified at the time of his or her conviction. A person sentenced as an habitual offender shall not be eligible for parole until he or she has served the minimum sentence of confinement of three years.

Iowa Code § 902.8 (1983).

The portion of that statute most pertinent on this appeal is the sentence: "An offense is a felony if, by the law under which the person is convicted, it is so classified at the time of his or her conviction." Id.

At the time Tobin was convicted, the law classified his crime as a class D felony. On appeal, the court of appeals affirmed the conviction but remanded for resentencing. The remand for resentencing did not alter or remove the conviction.

Defendant's reliance on State v. Wiese, 201 N.W.2d 734 (Iowa 1972), is misplaced. In that case, the Iowa Supreme Court required resentencing under a new penal statute which had become applicable following defendant's original sentencing. Id. at 738. Decisive in that case were a savings clause in the statute and the fact that no final judgment had been entered. Id. at 736-37. In the present case, the statute defining habitual offender penalties clearly states that the determination of whether the crime was a felony occurs at the time of the conviction. The sentence granted under the habitual offender statute was proper.

The findings of the trial court are affirmed.

AFFIRMED.