

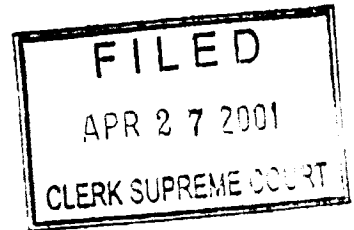
IN THE COURT OF APPEALS OF IOWA

No. 1-187/ 00-898
Filed April 27, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TOBIN JON DICKINSON
Defendant-Appellee.



Appeal from the Iowa District Court for Black Hawk County, Walter W. Rothschild, Judge.

The defendant appeals a district court ruling on a motion to correct sentence following his plea to second offense OWI. **AFFIRMED.**

Kellyann M. Lekar of Roberts, Stevens & Lekar, P.L.C., Waterloo, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Steven Norby, Assistant County Attorney, for appellant.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

VAITHESWARAN, J.

Tobin Jon Dickinson appeals a district court ruling on his motion to correct sentence following his plea to operating a motor vehicle while intoxicated, second offense. He contends the district court erred in (1) ordering his license revoked for six rather than two years and (2) requiring his attendance at Alcoholics Anonymous meetings, a condition of probation not recommended by the substance abuse evaluator. We affirm.

I. Background Facts and Proceedings

The State charged Dickinson with operating a motor vehicle while intoxicated, third offense. Iowa Code § 321J.2 (1999). Dickinson pled guilty to operating while intoxicated, second offense, an aggravated misdemeanor. A substance abuse evaluator made no treatment recommendation other than to suggest Dickinson "abstain from the use of all mood altering chemicals." On March 23, 2000 the district court sentenced Dickinson to a 180-day jail term with all but fifteen days suspended, two years of probation, and a minimum of two Alcoholics Anonymous meetings per week during the period of his probation. The court also imposed a fine and surcharges and ordered Dickinson's driver's license revoked for a period of six years.*

Dickinson filed a "Motion to Reconsider and for Correction of Sentence." In a ruling dated April 6, 2000, the district court denied the motion in its entirety.

Dickinson filed a notice of appeal on May 4, 2000. The State moved to dismiss the appeal as untimely, contending it should have been filed within thirty days of March 23, 2000, the date of the original judgment and sentence. The

Iowa Supreme Court ordered this issue submitted with the appeal and transferred the case to our court for disposition.

II. Timeliness of Appeal

Under Iowa Rule of Appellate Procedure 101, appeals in criminal actions must be taken within thirty days of the final judgment. See *a/so* Iowa Code § 903.2 (judgment is final for purposes of appeal when pronounced). This time limit is jurisdictional. *Swanson v. State*, 406 N.W.2d 792, 792 (Iowa 1987).

There is no question Dickinson's appeal was filed more than thirty days from the date the court sentenced him. However, it was filed within thirty days of the court's ruling on his motion to reconsider and for correction of sentence. The issue, therefore, is the effect of Dickinson's motion on the time limit for filing an appeal. In considering this issue we note the motion was in fact two motions: a motion to correct the license revocation portion of the sentence, which Dickinson believed was illegal, and a motion to reconsider the court's decision to order attendance at Alcoholics Anonymous meetings as a condition of his sentence. We will examine each motion.

A. Motion to Correct Sentence. In resisting the State's motion to dismiss his appeal, Dickinson relies on Iowa Rule of Criminal Procedure 23(5)(a), which authorizes a district court to correct illegal sentences. Dickinson maintains his appeal is timely because it was filed within thirty days of the court's ruling on his motion to correct sentence. The State agrees that a party may appeal from a ruling on a motion to correct sentence but argues Dickinson's notice of appeal sought review of only the original judgment and sentence and never mentioned

the ruling on the motion to correct sentence, thus depriving this court of jurisdiction.

We are not inclined to read the notice of appeal so narrowly. Dickinson appealed from "all adverse rulings of the judgment and sentence of the district court on March 23, 2000." This language sufficiently apprised the court and State that Dickinson intended to appeal from the ruling on the motion as well as the original judgment and sentence.

In declining to parse the language of the appeal notice, we do not ignore our highest court's opinion in *Jensen v. State*, 312 N.W.2d 581, 582 (Iowa 1981). The court there dismissed an appeal where the defendant did not specify he was appealing from the district court's denial of a motion to correct sentence rather than from the original judgment and sentence. We believe *Jensen* is distinguishable because the defendant in that case only stated he was appealing from the original sentence. *Jensen*, 312 N.W.2d at 582. He did not also appeal from "all adverse rulings", as Dickinson does here. We conclude this additional language clarifies Dickinson's intent to appeal from the ruling on the motion to correct sentence. *Id.* at 583 (dissenting opinion noting notice of appeal does not turn on form or accuracy but on whether intent of appellant may be inferred from it).

Our conclusion is consistent with the oft stated principle that "[v]oid sentences are not subject to the usual concepts of waiver, whether from a failure to seek review or other omissions of error preservation." *State v. Ohnmacht*, 342 N.W.2d 838, 843 (Iowa 1983). In *Ohnmacht*, a motion to correct a sentence was filed in the district court after the time period for seeking discretionary review of

the original judgment and sentence. Our highest court held "an illegal sentence is subject to correction regardless of whether or not" a direct appeal from the original judgment and sentence was timely filed. *Ohnmacht*, 342 N.W.2d at 843.

Because Dickinson timely appealed the court's ruling on his motion to correct sentence, we will consider his legal challenge to the license revocation portion of the sentence. However, we will not consider his appeal from the original judgment and sentence, as the appeal was filed more than thirty days after sentence was pronounced and neither party has cited authority holding a motion to correct sentence stays the time for filing an appeal from the original judgment and sentence. *Cf.* Iowa R. App. P. 5 (providing motions under Iowa R. Civ. P. 179(b) or 247 toll time for filing civil appeal).

B. Motion to Reconsider. We must next determine whether Dickinson timely appealed the ruling on his motion to reconsider. Motions to reconsider misdemeanor sentences are governed by Iowa Code section 903.2. That section provides:

For a period of thirty days from the date when a person convicted of a misdemeanor begins to serve a sentence of confinement, the court may order the person to be returned to the court, at which time the court may review its previous action and reaffirm it or substitute for it any sentence permitted by law. The sentencing court retains jurisdiction for the limited purposes of conducting such review and entering an appropriate order notwithstanding the timely filing of a notice of appeal or an application for discretionary review. The court's final order in the proceeding shall be delivered to the defendant personally or by certified mail. Such action is discretionary with the court and its decision to take the action or not to take the action is not subject to appeal. The other provisions of this section notwithstanding, for the purposes of appeal a judgment of conviction is a final judgment when pronounced.

This provision prohibits a defendant from challenging the merits of a sentencing order via an appeal from a denial of a motion to reconsider. See *State v. Wrage*, 279 N.W.2d 4,5 (Iowa 1979); cf. *State v. Morehouse*, 316 N.W.2d 884, 886 (Iowa 1982) (holding unappealable trial court's refusal to reconsider felony sentence); *State v. Broten*, 295 N.W.2d 453 (Iowa 1980) (holding jurisdiction existed to decide appeal from motion to reconsider because challenge was to court authority, not actual sentence); accord *State v. Sullivan*, 326 N.W.2d 361, 363 (Iowa 1982); *State v. Dvorsky*, 356 N.W.2d 609, 611 (Iowa Ct. App. 1984).

Dickinson's motion to reconsider in part challenges the court's authority to require attendance at Alcoholics Anonymous meetings, a condition of probation not recommended by the substance abuse evaluator. This portion of his challenge does not implicate the merits of the sentence. Therefore, although the argument is styled a "motion to reconsider", it is in substance a motion to correct sentence. We have already concluded the court's ruling on Dickinson's motion to correct the license revocation portion of the sentence was timely appealed. To the extent we construe his motion to reconsider as a motion to correct sentence, we will also proceed to consider his contention that the district court acted illegally in ordering a condition of probation not recommended by the evaluator.

III. License Revocation

Dickinson maintains the district court imposed an illegal sentence by ordering his license revoked for six rather than two years. He contends Iowa Code section 321J.4(2) only authorizes a two-year revocation for OWI second offense, the crime to which he pled guilty. The State responds that the plain language of a sister provision, Iowa Code section 321J.4(4), requires imposition

of a six year license revocation after the third OWI conviction, regardless of the level of the current offense. We agree with the State. Iowa Code section 321J.4(4) states, "[u]pon a plea or verdict of guilty of a third or subsequent violation of section 321J.2, the court shall order the department to revoke the defendant's driver's license or nonresident operating privilege for a period of six years." This provision does not turn on the level of the current OWI offense but on the number of prior violations. See *State v. Sharp*, 572 N.W.2d 917, 918 (Iowa 1997). Accordingly, we reject this argument.

IV. Attendance at Alcoholics Anonymous Meetings

Dickinson contends the court should not have required him to attend Alcoholics Anonymous meetings, because such a requirement 1) is contrary to the substance abuse evaluator's recommendation and 2) does not promote his rehabilitation or protect the community. See Iowa Code § 901.5. His second contention is a challenge to the merits of the sentence, which we do not have jurisdiction to consider. See Iowa Code § 903.2.

With respect to his first contention, Iowa Code section 907.3 affords a court discretion to "place a defendant on probation upon such terms and conditions as it may require including commitment to an alternate jail facility or a community correctional residential treatment facility. . . ." As this provision gives a court authority to place a defendant in a residential treatment facility, we conclude it also permits imposition of the far less restrictive alternative of attending Alcoholics Anonymous meetings. Cf. *State v. Sinclair*, 582 N.W.2d 762, 766 (Iowa 1998) (holding court did not act beyond authority in sentencing defendant to alcohol treatment center).

We reach this conclusion notwithstanding the substance abuse evaluator's decision not to recommend attendance at such meetings. Although Iowa Code section 321J.3(1)(a) states a court shall order a defendant to follow the treatment recommendations contained in a substance abuse evaluation, this provision does not preclude a court from ordering terms and conditions of probation in addition to those recommended in the evaluation. A contrary reading of this provision would effectively eliminate the discretion afforded courts under Iowa Code section 907.3 to impose conditions on probation.

The court here provided a detailed explanation of why it intended to deviate from the "no treatment" recommendation contained in the evaluation.

The court stated:

Mr. Dickinson, I don't know exactly what your age is, but you are a fairly young man to have accumulated three OWIs. And that's a fairly good indicator that you've got a drinking problem, sir. And these things, [referring to substance abuse evaluation] in my opinion, most of them aren't worth the paper they're written on. A young fellow comes to me on third offense and they say they don't have any problem or he doesn't need any treatment, B.S. You know the reality is otherwise. And I think if you get involved in A.A., that's your best hope of maintaining long term sobriety. Because in my experience that's the program that has had a good success rate providing the individual becomes committed to that program.

We believe the court adequately articulated its reasons for adding a condition of probation not contained in the evaluator's recommendation. For these reasons, we reject Dickinson's legal challenge to the requirement he attend Alcoholics Anonymous meetings.

The district court's ruling on Dickinson's motion to correct sentence is affirmed.

AFFIRMED.