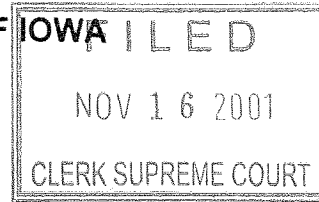


IN THE COURT OF APPEALS OF IOWA

No. 1-432 / 00-1032
Filed November 16, 2001



STATE OF IOWA,
Appellee,

vs.

DOUGLAS DONALD STEPHENS,
Appellant.

Appeal from the Iowa District Court for Cass County, Keith E. Burgett (Guilty Plea) and Charles L. Smith (Sentencing), Judges.

Defendant appeals from the judgment and sentence entered upon his guilty plea to third-degree theft, challenging both the validity of the sentence and the effectiveness of trial counsel. **CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING, WITH DIRECTIONS.**

Daniel J. Gonnerman of Newbrough, Johnston, Brewer, Maddux & Sotak, L.L.P., Ames, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, and James P. Barry, County Attorney, for appellee.

Heard by Vogel, P.J., and Miller and Eisenhauer, JJ.

000460

VOGEL, P.J.

Douglas Donald Stephens appeals his judgment and sentence for theft in the third degree, in violation of Iowa Code sections 714.1(1) and 714.2(3) (1999). Because the sentence was illegal, we vacate the sentence and remand for resentencing.

Background Facts and Proceedings. After entering not guilty pleas to a sixteen-felony-count trial information, Stephens negotiated a plea agreement with the State. Stephens agreed to plead guilty to one count of theft in the second degree and two counts of theft in the first degree, and the State agreed to dismiss the remaining counts and to abide by the recommendations in the presentence investigation report. Stephens then entered the three guilty pleas, which the district court accepted. The presentence investigation report recommended Stephens "receive a deferred sentence¹ and be placed on a period of supervised probation" for all three counts. After the report was submitted but before the sentencing hearing, Stephens filed a motion in arrest of judgment. The motion, which stated only Stephens' belief that "a jury would find him not guilty in this matter," was never ruled on by the court.

At the sentencing hearing the State presented, and Stephens and his counsel agreed to, a new disposition of the second-degree theft count: Stephens would withdraw his guilty plea and the State would amend the count to theft in the third degree, with a request the court suspend all but ninety days of the sentence to be imposed. The district court allowed the withdrawal, amendment

¹ At oral arguments defense counsel indicated that in spite of the mixed terminology, all parties and the court intended the use of the term "deferred judgment".

and subsequent plea, and proceeded to sentencing. In accord with the presentence investigation report, it deferred judgment and placed Stephens on probation for the two counts of theft in the first degree. On the amended count of theft in the third degree, it followed the apparent agreement of the parties, committing Stephens to the custody of the Director of the Iowa Department of Corrections for a term not to exceed two years, and suspending all but ninety days of the sentence. The court also ordered the ninety days to be served in the Cass County Jail.

Stephens appeals his conviction and sentence on the charge of theft in the third degree, arguing the court imposed an illegal "split sentence," and abused its discretion by failing to grant him a deferred judgment. He also alleges trial counsel was ineffective in failing to enforce the initial plea agreement and to pursue the motion in arrest of judgment.

Scope of Review. We review sentencing decisions for corrections of errors at law. Iowa R. App. P. 4. Any sentence not authorized by statute is void. *State v. Kapell*, 510 N.W.2d 878, 879 (Iowa 1994).

Abuse of Discretion. Stephens argues the district court failed to exercise its sentencing discretion, in that it did not recognize its ability to defer judgment on the misdemeanor count. He points to the sentencing record, and the fact the court did not provide any reason for imposing a different disposition on the misdemeanor count than it imposed on the felonies. Generally, a district court must state on the record its reasons for imposition of a particular sentence, and failure to do so is an abuse of discretion. *State v. Oliver*, 588 N.W.2d 412, 414 (Iowa

1998). However, a court need not state reasons when it does no more than effectuate the agreement of the parties. *State v. Snyder*, 336 N.W.2d 728, 729 (Iowa 1983). Here, we are presented with an agreed-upon recommendation for disposition of the misdemeanor count, and that recommendation was followed by the court. The imposition of judgment and sentence was therefore not the product of court discretion. Requiring a statement of reasons would have served no practical purpose, and any failure was accordingly harmless. *See id.*

Illegal Sentence. Stephens further argues, and the State concedes, that the district court imposed an illegal split sentence for third-degree theft. We agree. As Stephens was sentenced to a period of confinement in excess of one year, the district court properly committed him to the custody of the Director of the Iowa Department of Corrections. *See Iowa Code § 903.4* (1999). Under such circumstances, however, the place of confinement is to be designated by the Director. *Id.* This is true even where, as here, the sentence is partially suspended. *See State v. Patterson*, 586 N.W.2d 83, 84 (Iowa 1998) (per curium). Accordingly, the district court was without authority to order Stephens to serve any part of his sentence in the county jail, and the sentence must be vacated. *See State v. Kapell*, 510 N.W.2d 878, 880 (Iowa 1994).

Because the sentence for theft in the third degree was not authorized by statute, we vacate the sentence and remand for resentencing by the district court. We specifically direct the district court to set a new sentencing hearing no sooner than fifteen days after issuance of the procedendo. This will provide

Stephens an opportunity to request a ruling on his previously-filed motion in arrest of judgment.

Ineffective Assistance of Counsel. As a general matter, where a record on appeal is inadequate to assess the performance of trial counsel, we preserve the ineffective assistance claim for postconviction review. *State v. Oetken*, 613 N.W.2d 679, 683 (Iowa 2000). We find the record before us adequate to resolve Stephens' contention that trial counsel was ineffective by allowing the State to breach the initial plea agreement, and by failing to argue in support of a deferred judgment on the misdemeanor count. Such claims are defeated by the simple fact Stephens affirmatively assented to the terms of the amended agreement. See generally *State v. Speed*, 573 N.W.2d 594, 596 (Iowa 1998) (noting a defendant is bound by a voluntary plea). However, on this record we are unable to determine whether the plea was made knowingly and voluntarily. We therefore preserve for postconviction relief Stephens' ineffective assistance of counsel claim regarding entry of an invalid guilty plea. Finally, we neither preserve nor consider any ineffective assistance of counsel claims arising out of the two felony counts, as there is no right of appeal from a deferred judgment. *State v. Stessman*, 460 N.W.2d 461, 462 (Iowa 1990).

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING, WITH DIRECTIONS.