IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

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STATE OF IOWA,)

Plaintiff-Appellee,)

vs.) 1-375
66136

JOSEPH ALLAN CALHOUN)

Defendant-Appellant.)

Appeal from Boone District Court, M. D. Seiser, Judge.

Defendant appeals the sentence imposed on him for his conviction of robbery in the second degree in violation of sections 711.1 and 711.3, The Code 1979, claiming the mandatory minimum sentence provisions of section 902.7, The Code 1979, are not applicable to second-degree robbery under section 711.3, The Code 1979, and the stipulated facts are insufficient to invoke the mandatory minimum sentence provisions of section 902.7, The Code, 1979. AFFIRMED.

William R. Byers, Adel, for defendant-appellant.

Thomas J. Miller, Attorney General, and Thomas Martin, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

Defendant appeals the sentence imposed on him for his conviction of robbery in the second degree in violation of sections 711.1 and 711.3, The Code 1979, claiming the mandatory minimum sentence provisions of section 902.7, The Code 1979, are not applicable to second-degree robbery under section 711.3, The Code 1979, and the stipulated facts are insufficient to invoke the mandatory minimum sentence provisions of section 902.7, The Code 1979. We affirm defendant's sentence.

Defendant, Joseph Allan Calhoun, and two companions were charged with robbery in the first degree, in violation of sections 711.1 and 711.2, The Code 1979. All three were also charged with the crime of conspiracy to commit first-degree robbery, in violation of section 706.1, The Code 1979. Before trial, defendant and prosecutor negotiated a plea bargain. Under the plea bargain, the prosecutor proposed to reduce the first-degree robbery charge to second-degree robbery and to drop the conspiracy charge if defendant would plead guilty to the second-degree robbery charge and stipulate to the fact a firearm was used during the robbery by one of the defendant's accomplices. The stipulation was also to indicate defendant did not personally have control of a gun. The proposed plea bargain was accepted by the Honorable Paul E. Hellwege, who summarized the provisions of the agreement as follows:

> It's The Court's understanding that the plea-bargain is as follows:
>
> One: That the State will reduce the charge contained in Count I of the Information from robbery in the first degree to robbery in the second degree, the reduced charge being a Class-C felony;
>
> That in the event that the tendered "Guilty" plea of the Defendant to the reduced charge in Count I is accepted, that the State will reduce Count IV of the Informa- — or, will dismiss Count IV of the Information; [count IV is the conspiracy charge.]
>
> That in exchange for the Defendant's tendered plea of "Guilty", if accepted, it is stipulated that at the time of sentencing, Defendant will concede that an accomplice involved in the particular robbery did carry a firearm, as that phrase is — or, as that — as "firearm" is defined in the Code of Iowa;
>
> And that it -- both the State and the Defendant will, at the time of sentencing, submit to the sentencing Judge, who will make the determination as to whether or not Section 902.7, Code, applies, and whether or not the Judge is thereby bound to impose a minimum sentence.
>
> Does that cover it, gentlemen?

The parties accepted the trial court's restatement of the plea bargain and the legal issues engendered. The sentencing judge, the Honorable M. D. Seiser, held the defendant was involved in a forcible felony and the mandatory minimum sentence provision, section 902.7, The Code 1979, was applicable. The trial court, finding defendant received the benefit of his plea bargain, then sentenced defendant to the Anamosa Reformatory for a term not to exceed ten years and prohibited the consideration of defendant for probation until defendant had served the minimum five years, pursuant to sections 902.7, The Code 1979.

Defendant now appeals the sentence contending the mandatory minimum sentence provisions of section 902.7 are inapplicable to second-degree robbery and the stipulation entered into by defendant and the prosecutor was insufficient to invoke section 902.7.

At the outset, we note defendant was apprised of the fact the sentencing judge was to determine the legal issue of whether section 902.7 was applicable to the facts as stipulated in this case. Defendant was also apprised of the sentencing consequences of first-degree robbery as opposed to second-degree robbery. The record indicates defendant rejected the State's initial offer to forego pursuing the mandatory sentence in exchange for defendant's plea of guilty to first-degree robbery. Defendant accepted the State's second offer and opted to plead guilty to second-degree robbery and assume the risk the mandatory minimum sentence provisions would not apply to second-degree robbery. We are, therefore, in agreement with the sentencing court defendant realized the benefits of his plea bargain. Apparently defendant also agrees as there is no assertion by defendant that the plea bargain was not scrupulously followed.

We are convinced the mandatory minimum sentence under section 902.7, The Code, is applicable in this case.

Defendant initially questions whether second-degree robbery is a forcible felony as defined in section 702.11, The Code 1979. Section 702.11, The Code 1979, defines "forcible felony" as "any felonious assault, murder, sexual abuse, kidnapping, robbery, arson in the first degree, or burglary in the first degree."

Giving the language of section 702.11, The Code 1979, its ordinary meaning, State v. Jackson, 305 N.W.2d 420, 422 (Iowa 1981), we find no language limiting "forcible felonies" to only robberies in the first degree. Cf. State v. Matlock, 289 N.W.2d 625, 629 (Iowa 1980)(where the supreme court acknowledged the trial court's finding of fact, "beyond a reasonable doubt, defendant had committed the forcible felony of robbery in the second degree.")

Defendant also claims the stipulation, establishing he did not use a firearm during the robbery, but his companions did, precludes application of section 902.7, The Code, to him in this case. Defendant's contention raises two questions: (1) does the mandatory minimum sentence of section 902.7, The Code 1979, apply to the nonfirearm-wielding accomplice to a forcible felony involving a firearm and (2) does section 902.7, The Code 1979, ever apply to second-degree robbery convictions.

The first question was answered in State v. Sanders, 280 N.W.2d 375 (Iowa 1979). In State v. Sanders, 280 N.W.2d at 377, the court held the mandatory minimum sentence for use of a firearm during the commission of a forcible felony applied to the offender, who had possession or control of the gun, and also to any aiders or abettors who did not have control of a firearm. State v. Sanders essentially espouses a rule of law under which an accomplice's use of a firearm is imputed to the other accomplices. We see no reason to treat a defendant, who stipulated to not using a firearm during the commission of a forcible felony any differently from a defendant who had the same fact adjudicated by the trier of fact. The defendant in this case should not be placed in a better position than the defendant in Sanders just because he entered into a stipulation that he did not carry a firearm. Nor do we see any reason to treat defendant in this case, who was charged as a principal offender, any differently from the defendant in Sanders, who was charged as an aider and abettor.

Defendant also claims the mandatory minimum sentence for use of a firearm should not apply when he plead guilty to the crime of second-degree robbery,

which, he claims, by definition does not involve the use of a dangerous weapon. The implication of defendant's argument is that the mandatory minimum sentence can only apply to convictions for first-degree robbery, but never to second degree robbery. We see no merit in defendant's argument.

We are of the opinion a properly accepted plea of guilty to second-degree robbery establishes all of the elements of robbery as defined generally in section 711.1, The Code 1979. See e.g., State v. Killpack, 276 N.W.2d 368, 371 (Iowa 1979). A conviction for second-degree robbery does not preclude a finding defendant used a dangerous weapon in the commission of the crime. See e.g., State v. Holmes, 276 N.W.2d 823, 824 (Iowa 1979). Similarly a plea of guilty to second-degree robbery does not establish the absence of the additional elements, such as use of a firearm during the commission of the crime, required to prove first-degree robbery under section 711.2, The Code 1979. Thus, the mere fact defendant plead guilty to a crime, which did not require use of a dangerous weapon, does not insulate him from a finding a dangerous weapon was used in the crime and imputing that use to him. See State v. Sanders, 280 N.W.2d 375 (Iowa 1979).

In State v. Matlock, 289 N.W.2d 625 (Iowa 1980), the court refused to apply the mandatory minimum sentence to a defendant involved in a second-degree robbery. In Matlock however, there had been no finding a firearm had in fact been used or represented to have been used in the felony. In the case at bar, the stipulation established the use of a firearm in the robbery by one of the defendant's accomplices. By virtue of the rule of law enunciated in State v. Sanders, defendant had possession or control of a firearm. We hold the mandatory minimum sentence of section 902.7, The Code 1979, is applicable to defendant's conviction for second-degree robbery.

AFFIRMED.