IN THE COURT OF APPEALS OF IOWA

FILED
SEP 29 1981
CLERK SUPREME COURT

STATE OF IOWA, )

Plaintiff-Appellee, )

vs. )

HON. J. HOBART DARBYSHIRE, )
Judge of the Seventh Judicial District )
of Iowa, )

Defendant-Appellant. )

Filed September 29, 1981

1-180
2-64931

Appeal from Clinton District Court. J. Hobart Darbyshire, Judge.

The State appeals by writ of certiorari for review of a suspended sentence and probation granted by the defendant judge to Paul A. Bertrand who pleaded guilty to terrorism. WRIT OF CERTIORARI SUSTAINED AND REMANDED FOR RESENTENCING IN ACCORDANCE WITH ORIGINAL SENTENCE.

J. Drew Chambers of Holleran, Shaw, Murphy & Stoutner, Clinton, Ia., for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa and Kathy Krewer, Assistant Attorney General, for plaintiff-appellee.

Submitted to Oxberger, C. J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant Judge J. Hobart Darbyshire presided over a case in which Paul A. Bertrand pleaded guilty to the crime of terrorism in violation of section 708.6(1), The Code 1979. Bertrand was initially sentenced to a term not to exceed five years of incarceration, but when Bertrand filed an application for reconsideration of sentence, the defendant judge amended the sentence by suspending it and by placing Bertrand on probation. We sustain the writ of certiorari and remand for resentencing in in accordance with the original sentence.

The State-petitioner challenges via certiorari the district court's granting probation and suspending the sentence of a defendant convicted of terrorism. The State-petitioner carries the burden to show that the defendant judge exceeded his proper jurisdiction or otherwise acted illegally. Iowa R. Civ. P. 306.

Bertrand agreed to plead guilty to the charge of terrorism in violation of section 708.6(1) ostensibly in exchange for the State's agreeing to forego litigating the issue of whether or not a firearm was used in the commission of the offense. The express reasoning for this agreement was "...to avoid the application of 902.7..." (the minimum sentence statute). The defendant judge accepted the plea agreement ruling "... there is a factual basis for defendant's plea of guilty after questioning him about same."

When Bertrand later asked for reconsideration of his sentence under section 902.4, the defendant judge agreed and subsequently suspended the sentence and placed Bertrand on probation. One question we are faced with is whether the defendant judge acted illegally in doing so.

I. In the case of State v. Young, 293 N.W.2d 5 (Iowa 1980), the court ruled that the act of terrorism with the use of a firearm could not be committed without also committing an assault, thus it was a felonious assault and as such, a forcible felony. Since the court held that the act was a forcible felony, and since it was proven that a firearm was used, the defendant in Young was subject to a mandatory minimum five-year prison term under section 902.7.

In the instant case, we have a plea bargain agreement, which was accepted by the court, in which the State and the defendant agreed to make no finding about the use of a firearm. So before we can decide whether the defendant judge acted illegally in reconsidering Bertrand's sentence, we must first determine whether a violation of section 708.6(1), without proof of use of a firearm, is also a felonious assault, and thus a forcible felony within the meaning of section 702.11. We hold that it is.

The crime of assault is defined in section 708.1, and that section provides that a person commits an assault when "without justification, the person does... [a]ny act which is intended to cause pain or injury to... another, coupled with the apparent ability to execute the act" or "[a]ny act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting or offensive, coupled with the apparent ability to execute the act."

Terrorism under section 708.6(1) requires the doing of an act with the intent to injure or provoke fear or anger in another person. The defendant judge urges us to read this statute in what is essentially a bifurcated manner. His position is that it is possible to commit terrorism in two ways: one, with intent to provoke anger, and two, with intent to place another in fear of immediate harmful physical contact. He argues that Bertrand's act fell under the first method, thus it was not an assault because the element of fear was not present, as required by the assault statute, section 708.1. The offense described in section 708.6(1) cannot be committed without placing one in apprehension of injury. We hold the word apprehension is synonymous with the word fear in this context. The natural consequence of Bertrand's action was to place the home's occupants in fear. Thus, we hold that defendant's act of terrorism was a felonious assault under section 702.11, and consequently a forcible felony.

II. When the Young court decided that terrorism under 708.6(1) with the use of a firearm was a felonious assault, and thus a forcible felony, the particular defendant's acts clearly fell within the minimum sentence provisions of section 902.7. In Bertrand's case, however, the element of the use of a firearm is removed from our consideration because of the plea agreement.

We have decided that Bertrand's act was a forcible felony, but it is not a crime for which a minimum sentence can be imposed. Since the crime is a forcible felony, though, a deferred or suspended sentence would have been precluded initially under section 907.3. The issue is: Does section 907.3, which prohibits a deferred or suspended sentence for a defendant convicted of a forcible felony, preclude suspension of the sentence upon later reconsideration under section 902.4?

The Iowa Supreme Court has answered that question affirmatively in State v. Broten, 295 N.W.2d 453, 455 (Iowa 1980). The reason is because of the language in section 902.4 which sets forth two different limitations on what sentences can be reconsidered.

> The phrase, "a class 'A' felony or felony for which a minimum sentence of confinement is imposed," sets forth limitations under which a sentence may not be reconsidered at all. The phrase "or substitute for it any sentence permitted by law," constrains the type of sentence that may be imposed in place of the original sentence in cases in which reconsideration is permitted.

State v. Broten, 295 N.W.2d at 455.

Since we have held that terrorism under section 708.6(1) is a forcible felony, the court could not grant deferral or probation or suspend the sentence upon reconsideration. The court could not have granted such relief initially, and it may not do so upon reconsideration either.

WRIT OF CERTIORARI SUSTAINED AND REMANDED FOR RESENTENCING IN ACCORDANCE WITH ORIGINAL SENTENCE.