



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellant,	)	Filed February 22, 1979
	)	
vs.	)	
	)	
ROBBY DEAN ABRAM,	)	789
	)	<u>61942</u>
Defendant-Appellee.	)	

Appeal from Polk District Court - Luther T. Glanton, Judge.

State appeals from sentencing of defendant under Supplement to The Code 1977.
Affirmed.

Thomas J. Miller, Attorney General of Iowa, Kermit Dunahoo, Assistant Attorney General, and Dan Johnston, Polk County Attorney, counsel for appellant.

Clarence A. Stennes, of Des Moines, counsel for appellee.

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

DONIELSON, J.

On December 8, 1977, defendant Robby Dean Abram entered a plea of guilty to the crime of larceny of a motor vehicle in violation of § 321.82, The Code 1977. On January 1, 1978, this state's new criminal code went into effect. On January 13, 1978, defendant was sentenced under the 1977 code to ten years at the Men's Reformatory; the sentence was suspended, and defendant was granted probation for two years. On January 23, 1978, defendant requested to be sentenced under the provisions of the newly effective criminal code in a motion entitled, "Motion to Reconsider Sentencing." The State resisted, and after hearing, on March 13, 1978, the trial court set aside defendant's first sentence and sentenced him to a term not to exceed five years under § 321.483, Supplement to The Code 1977. Again defendant's sentence was suspended and he was granted probation for two years. The State appeals, contending the trial court was without jurisdiction to sentence defendant anew under the revised criminal code. It urges that once a valid final sentencing order is imposed, the trial court is without jurisdiction and authority to modify, amend or revise it in any way, and any attempt to do so is of no effect.

Section 801.5(2)(b)(2), Supplement to The Code 1977, allows a defendant to request sentencing under the new criminal code.

2. In any case pending on or commenced after the effective date of this Act, involving an offense committed before that date:

* * *

b. Upon the request of the defendant and the approval of the court:

* * *

(2) The court may impose a sentence or suspended imposition of a sentence under the provisions of this Act applicable to the offense and the offender.

In this case, allowing defendant to make that request after sentencing under the prior code provisions had taken place would give effect to both § 801.5 and the general savings provision of § 4.13, The Code 1977: "If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment, revision, or amendment of a statute, the penalty, forfeiture, or punishment if not already imposed shall be imposed according to the statute as amended." See *Cartee v. Brewer*, 265 N.W.2d 730, 733 (Iowa 1978).

Defendant's case was pending and sentence had not yet been imposed on January 1, 1978 when the new criminal code went into effect. Provisions of that statute reduced the maximum sentence for the crime to which defendant pleaded guilty from 10 years to 5 years. An ameliorative change in a penal statute should be extended to every case in which it properly can apply. *State v. Wiese*, 201 N.W.2d 734, 737 (Iowa 1972).

We find the trial court had authority in this unique situation to resentence defendant under the provisions of the new criminal code reducing the maximum penalty, as it would in situations where a mistake has been made, *State v. Johnson*, 222 N.W.2d 453 (Iowa 1974), or the original sentence was illegal, *State v. Taylor*, 258 Iowa 94, 137 N.W.2d 688 (1965). See also § 902.4, Supplement to The Code 1977. Defendant made his request within a reasonable time after the original sentence was imposed, and at a time of confusion involving the effectiveness of a completely revised criminal code. The trial court's action in resentencing defendant according to the provisions in the newly effective criminal code is affirmed.

AFFIRMED.