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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed January 30, 1981

vs.)

CHARLES WAYMAN BERRY,) 0-316
62393 & 64930

Defendant-Appellant.)

Appeal from Polk District Court - C. Edwin Moore, Senior Judge.

In two consolidated appeals, defendant challenges the judgment entered on his conviction for violation of section 204.401(1), Supplement to the Code 1977, and trial court's subsequent denial of his application for postconviction relief contending: 1) that trial court erred in its jury instruction on the element of profit; 2) that section 232.72, The Code 1977, gave trial court discretion to refer defendant back to juvenile court or to give him probation and therefore trial court erred in stating the reason for the sentence was the mandatory requirement of section 907.3; 3) that trial court erred by failing to sentence defendant to an indeterminate term as required by section 902.3; 4) that the testimony of a State's witness went beyond the minutes of testimony; and 5) that defendant was denied effective assistance of trial counsel. SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING.

Judd Golden of Flagg, Hockett, Benhart, Golden & Cook, Des Moines, Iowa, for defendant-appellant.

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

Heard by Donielson, Acting C.J., and Snell, Carter and Johnson, JJ. Oxberger, C.J., takes no part.

In two consolidated appeals, defendant, Charles Wayman Berry, challenges the judgment entered on his conviction for violation of section 204.401(1), Supplement to the Code 1977, and trial court's subsequent denial of his application for postconviction relief. He contends: 1) that trial court erred in its jury instruction on the element of profit; 2) that section 232.72, The Code 1977, gave trial court discretion to refer defendant back to juvenile court for disposition of his case or to give him probation and therefore trial court erred in stating the reason for the sentence was the mandatory requirement of section 907.3, Supplement to the Code 1977; 3) that trial court erred by failing to sentence defendant to an indeterminate term as required by section 902.3, Supplement to the Code 1977; 4) that the testimony of a State's witness went beyond the minutes of testimony; and 5) that defendant was denied effective assistance of trial counsel. We vacate defendant's sentence and remand the case for resentencing.

On March 2, 1978, defendant, then age 17, was charged with delivery of amphetamines, a Schedule II controlled substance. After a transfer hearing, the juvenile court waived jurisdiction so that defendant could be prosecuted as an adult in district court. Following trial, the jury returned a verdict of guilty for violation of sections 204.401(1) and 204.410, The Code 1977. Trial court pronounced sentence "for a period of five years" under section 204.401(1)(b), Supplement to the Code 1977. The court also stated that the sentence was deemed mandatory under section 907.3, Supplement to the Code 1977. Defendant filed notice of appeal from this conviction on August 22, 1978. He subsequently filed an application for postconviction relief alleging that he was denied effective assistance of counsel at trial. Following a hearing, the application was denied. Defendant's appeal followed. By order dated May 27, 1980, both appeals were consolidated.

I. Scope of Review. Our review of defendant's conviction is on assigned error only. Iowa R. App. P. 4. Review of postconviction rulings under section 663A.9, The Code 1979, generally is on error and not de novo. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). In that event, we will not disturb trial court's judgment if the findings of fact in support of its judgment denying postconviction relief are supported by substantial evidence and are justified as a matter of law. Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 30 (Iowa 1979). Where a petitioner alleges a violation of a constitutional safeguard, however, we will make the equivalent of a de novo review. Sims v. State, 295 N.W.2d 420, 422 (Iowa 1980). Because we conclude that this case should be remanded due to a sentencing error, we will address this issue first.

II. Sentencing Errors. Defendant contends that trial court erred in imposing sentence because 1) the court stated an erroneous reason for its sentence and 2) the court sentenced defendant to a determinate sentence.

A. Discretion in Sentencing. Defendant first alleges that trial court erred in stating that the sentence was mandatory under section 907.3, Supplement to the Code 1977, when section 232.72, The Code 1977, permitted discretion either to impose probation or to refer the case back to juvenile court for further disposition.

Section 232.72, The Code 1977, provides:

> When such child pleads guilty or is found guilty of a public offense in another court that court may with the consent of the juvenile court refer the child back to the juvenile court for further disposition. In any event the court before whom the plea was made or the conviction was had is expressly authorized to set aside such plea or conviction but only after the child has successfully completed a period of probation of not less than one year.

Since defendant had been transferred by motion from the juvenile court to the district court, the sentencing option of section 232.72 was clearly applicable. Under this section, the juvenile court could order any disposition available under chapter 232 if the case were transferred back to that court.

Defendant further alleges that, whether or not the case was sent back to juvenile court for disposition, the district court could have placed him on probation and thereafter set aside his plea or conviction after one year of successful probation. He argues that the general mandatory requirement of section 907.3, which prohibits granting a deferred judgment, deferred sentence, or suspended sentence for persons convicted under section 204.401(1) or (2), is in conflict with the special statutory provisions of section 232.72.

Defendant relies on section 4.7, The Code, and State v. Davis, 195 N.W.2d 677 (Iowa 1972). Section 4.7 provides that if there is an irreconcilable conflict between a general statutory provision and a special provision, the special provision prevails. The court, in Davis, referred to the trial court's discretion in sentencing the defendant as a juvenile stating: "[t]he sentencing court is specifically authorized [under section 232.72] to give special treatment to juveniles who have been transferred from juvenile court for prosecution under adult standards." 195 N.W.2d at 678. Thus, defendant argues, the trial court had discretion to either impose probation or refer defendant back to juvenile court for further disposition but failed to exercise that discretion, or at least failed to state its reasons for not doing so.

We agree with defendant's assertion that error occurred due to trial court's conclusion that its sentence was mandatory under section 907.3. With juvenile court consent, trial court did have discretion to refer the case back to juvenile court for proper disposition. We are not persuaded, however, that trial court could order probation as an appropriate disposition due to the provisions of section 907.3. We find section 232.72 merely permits setting aside the plea or conviction after a period of probation, if probation was legally available at the time of sentencing. Here only the juvenile court could authorize probation.

In this regard, we further note section 232.45(11), The Code 1979, which provides:

> If a child who is alleged to have delivered, manufactured, or possessed with intent to deliver or manufacture, a controlled substance except marijuana, as defined in chapter 204, is waived to district court for prosecution, the mandatory minimum sentence provided in section 204.413 [requiring persons sentenced under section 204.401(1)(a) or (b) to serve a mandatory minimum period of confinement of one-third of the maximum indeterminate sentence before he or she is eligible for parole] shall not be imposed if a conviction is had; however, each child convicted of such an offense shall be confined for not less than thirty days in a secure facility.

While this section is not controlling in the present case, we believe its provisions demonstrate that the legislature was aware of chapter 907 but chose not to authorize probation as a special sentencing option for juvenile violators of section 204.401(1)(a) or (b) who are transferred for prosecution in district court.

We find the record is inadequate to permit a determination of whether trial court abused its discretion in sentencing defendant under section 204.401(1)(b) and section 907.3 rather than referring him back to the juvenile court for disposition under section 232.72. We therefore remand this case for resentencing and development of an adequate record specifically stating trial court's reasons for its disposition.

B. Indeterminate Sentence. Defendant next contends that trial court erred in sentencing him to a definite term of five years instead of an indefinite term. Section 902.3 clearly requires indeterminate sentencing. § 902.3, Supplement to the Code 1977; see State v. Howell, 290 N.W.2d 355, 357 (Iowa 1980). If, upon remand and resentencing, defendant is sentenced under section 902.3 for violation of section 204.401(1), the sentence should be to confinement for not more than five years and a fine of not more than one thousand dollars. § 902.9, Supplement to the Code 1977; Howell, 290 N.W.2d at 357.

III. Other Assignments of Error. We have reviewed each of the other issues raised by defendant and find no reversible error. Sentence is vacated and this case remanded for resentencing and development of an adequate record.

VACATED AND REMANDED FOR RESENTENCING.