

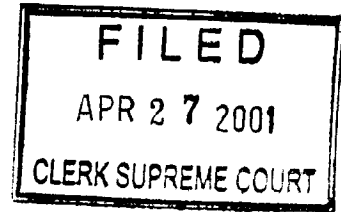
IN THE COURT OF APPEALS OF IOWA

No. 0-788 / 99-1957
Filed April 27, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LEE ALLEN EMERY,
Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

The defendant appeals his convictions and sentences following entry of guilty pleas to charges of possession of methamphetamine with intent to deliver and two counts of carrying weapons. **DISTRICT COURT JUDGMENT REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John P. Sarcone, County Attorney, and Daniel C. Voogt, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Zimmer and Miller, JJ.

ZIMMER, J.

Lee Emery appeals his conviction and sentences following entry of guilty pleas to charges of possession of methamphetamine with intent to deliver and two counts of carrying weapons. This appeal presents two issues of first impression. The first concerns the propriety of joining juvenile offenses with an adult offense in a reverse waiver case. The second concerns whether Iowa Code section 232.45(14) (waiver of mandatory minimum sentence) applies in the reverse waiver context.

1. Background Facts and Proceedings. On May 21, 1999, Emery was formally charged by five-count trial information with possession of methamphetamine with intent to deliver in violation of Iowa Code section 124.401(1)(b)(7) (1997), a tax stamp offense in violation of Iowa Code section 453B.3 (1997), two carrying weapons offenses in violation of Iowa Code section 724.4 (1997), and possession of marijuana in violation of Iowa Code section 124.401(5) (1997). Although Emery was seventeen years old at the time he committed the alleged violations, all five charges were originally filed in district court, presumably under authority of Iowa Code section 232.8(1)(c), which exempts certain offenses from jurisdiction of the juvenile court.

On November 9, 1999, Emery pled guilty, pursuant to a plea agreement, to possession of methamphetamine with intent to deliver and the two counts of carrying weapons. In exchange, the State agreed to dismiss the two remaining counts, and further agreed not to seek sentencing enhancements for possession of a weapon in connection with a drug offense, within the meaning of section

124.401(1)(e), or for Emery's presence in a school zone, within the meaning of section 124.401A.

Emery requested and was granted immediate sentencing. He was sentenced to a term of incarceration not to exceed twenty-five years for the possession charge, to be served concurrently with a two-year sentence for each charge of carrying weapons. Emery received reductions in the mandatory sentence applicable to his drug conviction, based on his guilty pleas and his cooperation with the State. This appeal followed.

II. Joining Juvenile Offenses with Adult Offenses. Emery first contends the district court imposed illegal sentences with respect to the carrying weapons charges because those charges were subject to the juvenile court's exclusive jurisdiction, unless waived to district court. He asserts the judgments and sentences on the weapons offenses were therefore void as a matter of law. The State contends Emery's guilty pleas waived any objections to the district court's authority. In reply, Emery declares this issue is properly before this court as either an illegal sentence or as a jurisdictional defect.

A challenge to subject matter jurisdiction may be made at any time. *State v. Oetken*, 613 N.W.2d 679, 686 (Iowa 2000). Thus, we are obligated to address the jurisdictional defect claimed by Emery, even though the issue was not raised in district court. Our review of such a challenge is for errors at law. *Id.*

The Iowa Supreme Court has already examined the issue of whether a juvenile waives a challenge to the district court's authority by pleading guilty. In *State v. Yodprasit*, 564 N.W.2d 383, 384 (Iowa 1997), a juvenile had been charged in juvenile court with going armed with intent, attempted murder, and

willful injury. The State filed a motion asking the juvenile court to waive its jurisdiction so Yodprasit could be prosecuted as an adult. *Id.* This motion was granted. *Id.* On appeal, Yodprasit raised several issues that dealt with matters stemming from the juvenile court proceedings. *Id.* at 384-85. Yodprasit alleged the errors in the juvenile court's waiver hearing deprived the district court of subject matter jurisdiction "to conduct criminal proceedings, accept his guilty plea, and enter convictions and sentences." *Id.* at 385.

The court in *Yodprasit* distinguished subject matter jurisdiction from authority. *Id.* Subject matter jurisdiction is the power of a court to hear and determine cases of a general class. *Id.* "Such jurisdiction flows from the constitution or from statutes and cannot be conferred by consent, waiver, or estoppel." *Id.* Conversely, authority is the ability of a court to hear a particular case. *Id.* "A court may have subject matter jurisdiction but for one reason or another may not be able to entertain a particular case. In such a situation we say the court lacks authority to hear that particular case." *Id.* (quoting *State v. Mandicino*, 509 N.W.2d 481, 482 (Iowa 1993)). This distinction is important because while subject matter jurisdiction cannot be conferred by waiver, consent or estoppel, an impediment to the court's authority can be obviated by consent, waiver or estoppel where subject matter jurisdiction exists. *Mandicino*, 509 N.W.2d at 483.

The *Yodprasit* court determined because Yodprasit had been waived to the district court by the juvenile court, the district court properly had subject matter jurisdiction over his case. *Yodprasit*, 564 N.W.2d at 386-87. Therefore, any deficiencies in the waiver hearing were mere impediments to the district

court's authority, which could be waived. *Id.* In that instance, Yodprasit's guilty plea was considered a waiver. *Id.* at 387. The State urges us to adopt the holding in *Yodprasit* for Emery's case. As the facts of Emery's case are different from *Yodprasit*, we decline to do so.

As a general rule, the juvenile court has exclusive original jurisdiction over proceedings involving a child alleged to have committed a delinquent act. Iowa Code § 232.8(1)(a). This means "proceedings concerning delinquent acts *must originate in juvenile court* and continue in juvenile court until that court waives jurisdiction pursuant to Iowa Code section 232.45." *Yodprasit*, 564 N.W.2d at 386 (emphasis added). However, Iowa Code section 232.8(1)(c) provides certain offenses committed by juveniles age sixteen or older are excluded from the jurisdiction of the juvenile court.

In Emery's case, all five charges were originally brought in district court. Iowa Code section 232.8(1)(c) clearly allows the district court jurisdiction over the charge that Emery possessed methamphetamine with intent to deliver while in possession of a weapon. See Iowa Code §§ 124.401(1)(b)(7) & 124.401(1)(e). Section 232.8(1)(c) provides in pertinent part:

Violations by a child, age sixteen or older, which subject the child to the provisions of sections 124.401, subsection 1, paragraph "e" or "f", or violations of section 723A.2, which involve a violation of chapter 724, or violation of chapter 724, which constitutes a felony, or violations which constitute a forcible felony are excluded from the jurisdiction of juvenile court and shall be prosecuted as otherwise provided by law unless the court transfers jurisdiction of the child to the juvenile court upon motion and for good cause.

Iowa Code § 232.8(1)(c). We conclude the other charges against Emery were not properly joined with the possession charge in district court under authority of section 232.8(1)(c).

Because section 232.8(1)(c) only gave the district court subject matter jurisdiction over the drug possession charge, the other four charges should have been brought in juvenile court instead of district court as is required by section 232.8(3). Bringing these charges in juvenile court and waiving them to adult court is the procedure by which the adult court invokes subject matter jurisdiction. The failure to do so was not a mere flaw in the invoking procedure that presented a simple impediment to the district court's authority. Instead, it was a complete bypass of the invoking procedure that produced a lack of subject matter jurisdiction by the district court. This defect could not be waived by Emery's plea of guilty or his failure to object to the district court's jurisdiction to accept his plea and impose sentence.

The State contends we should construe section 232.8(1)(c) to allow joinder of "closely related" offenses. While this may be a desirable result, the law does not provide for it. "The province of the judiciary is to construe statutory law, not to make law not passed by the legislature." *State v. Robinson*, 618 N.W.2d 306, 322 (Iowa 2000). Therefore, we decline the State's invitation to expand the scope of section 232.8(1)(c) beyond its plain language.

Because we find the district court had no subject matter jurisdiction over the two weapons offenses, we conclude the court's judgment and sentence for those offenses must be set aside. See *In re Melodie L.*, 591 N.W.2d 4, 7 (Iowa 1999) ("Any unauthorized action taken by a court is void."). This conclusion obviously impairs the plea agreement between the State and Emery. As a result, we conclude the plea agreement should be voided and the court's entire judgment must be vacated.

III. Application of the One-Third Minimum Sentence. Emery also contends the district court erred in imposing a one-third minimum sentence under Iowa Code sections 124.413 and 901.10. Instead, Emery argues he is eligible for sentencing as provided in Iowa Code section 232.45(14). Although we have voided Emery's sentence, we choose to address this issue because it may arise on remand.

Iowa Code section 232.45(14) states:

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 124, is waived to district court for prosecution, the mandatory minimum sentence provided in section 124.413 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.

Iowa Code § 232.45(14). Emery's argument centers on the notion a juvenile prosecuted in district court under Iowa Code section 232.8(1)(c) is "waived" to district court as a matter of law and therefore falls under the provisions of section 232.45(14).

The Iowa Supreme Court recently rejected similar arguments in *State v. Gilliland*, 604 N.W.2d 666 (Iowa 2000). In *Gilliland*, the court considered whether a juvenile charged in district court under Iowa section 232.8(1)(c) was eligible for deferred judgment under Iowa Code section 232.8(3). *Id.* at 666-67. The court held where a juvenile is charged with an offense over which the district court had original jurisdiction, the jurisdiction was never waived from juvenile court. *Id.* at 667.

The reasoning in *Gilliland* applies equally here. We cannot find Emery was "waived" to district court as a matter of law.

Emery also argues treating sentencing of reverse waiver and waiver on motion cases alike will avoid an equal protection problem. As the State points out, the supreme court has already rejected an equal protection challenge regarding the inability of juveniles charged under Iowa Code section 232.8(1)(c) to be considered for deferred judgment under Iowa Code section 232.8(3). *State v. Mann*, 602 N.W.2d 785, 791-93 (Iowa 1999). Again, this holding bars Emery's equal protection claim from succeeding.

We conclude the district court did not err in imposing the mandatory minimum sentence on the methamphetamine offense.

IV. Summary. We conclude the district court lacked jurisdiction to enter judgment and sentences on Emery's carrying weapons offenses. Because this jurisdictional defect impairs the entire plea agreement between the State and the defendant, we conclude defendant's entire plea package must be set aside. We therefore void defendant's drug conviction (Count I) and his two convictions for carrying weapons (Count III and IV). In addition, we set aside the dismissal of the tax stamp charge (Count II) and the possession of marijuana charge (Count V). We remand Count I to the district court and Counts II, III, IV, and V to the juvenile court for proceedings not inconsistent with this opinion. Finally, we hold the exemption from the mandatory minimum drug sentence for certain juveniles under Iowa Code section 232.45(14) does not apply in reverse waiver cases.

DISTRICT COURT JUDGMENT REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.

Miller, J., specially concurs; Sackett, C.J., concurs in part and dissents in part.

Miller, J. (concurring specially)

I concur in Judge Zimmer's opinion and the result, and write separately only to express an additional reason why I believe this case presents an issue of subject matter jurisdiction.

Subject matter jurisdiction refers to a court's power "to hear and determine cases of the general class to which the proceedings in question belong, not merely the particular case then occupying the court's attention." *State v. Mandicino*, 509 N.W.2d 481, 482 (Iowa 1983) (quoting *Christie v. Rolscreen Co.*, 448 N.W.2d 447, 450 (Iowa 1989)). It flows from the constitution or statutes and cannot be conferred by consent, waiver or estoppel. *State v. Yodprasit*, 564 N.W.2d 383, 385 (Iowa 1987). It is "a statutory matter and cannot be waived by consent, waiver, or estoppel." *Mandicino*, 509 N.W.2d at 482. Only the legislature has the power to create and define crime. *State v. Watts*, 186 N.W.2d 611, 614 (Iowa 1971). All crimes in Iowa are statutory. *State v. Robbins*, 257 N.W.2d 63, 67 (Iowa 1977).

The district court of course has subject matter jurisdiction in criminal cases. Iowa Const. art. V, § 6; Iowa Code § 602.6101 (1999); *Yodprasit*, 564 N.W.2d at 385. However, certain principles which flow from those stated in the preceding paragraph, together with statutes enacted pursuant to such principles, lead me to conclude that under the facts presented the juvenile court, rather than the district court within which the juvenile court is established, had the exclusive power to hear and determine cases of the general class to which the four "charges" at issue belong.

Whether an act (or omission) constitutes a crime and thus falls within the district court's subject matter jurisdiction of criminal cases depends on legislative action defining the act as a crime. The legislature has in general defined the acts underlying the four "charges" at issue as crimes. However, the same power that allows the legislature to determine that an act is a crime allows it, subject only to constitutional restrictions, to define such an act as something other than a crime and exempt it from the district court's subject matter jurisdiction of criminal cases when the act is done by a member of a certain class or classes of persons. The legislature has done so as to cases of the general class to which the four "charges" at issue belong by defining the underlying acts as "delinquent acts" rather than crimes when those acts are done by persons under eighteen years of age, and by placing in the juvenile court "exclusive original jurisdiction" of proceedings concerning children who are alleged to have done those acts. See Iowa Code §§ 232.2(12) (defining "Delinquent Act"), 232.2(5) (defining a "Child" as a person under eighteen years of age), and 232.8(1)(a) (providing that the juvenile court has "exclusive original jurisdiction" of proceedings concerning a child who is alleged to have committed a delinquent act). It is undisputed that Emery was seventeen years of age, that the four "charges" at issue are all ones that fall within the "exclusive original jurisdiction" of the juvenile court when the underlying acts are done by a juvenile, and that the four "charges" were not brought in the juvenile court.

This does not end the inquiry, however. The same power that allows a legislature to exempt acts by juveniles from the district court's subject matter jurisdiction of criminal cases allows the legislature to make exceptions to the

exemptions and thus place within the criminal jurisdiction a class or sub-class of cases that would otherwise be within the exclusive original jurisdiction of the juvenile court. Our legislature has established criteria and a procedure allowing for such a "waiver" of juvenile court jurisdiction. See Iowa Code § 232.45 (providing for juvenile court "waiver" of jurisdiction following notice, consent or hearing, and required findings). However, because the four "charges" at issue were never brought in the juvenile court, no proceedings for "waiver" of the juvenile court's "exclusive original jurisdiction" were ever held and no order for waiver of such jurisdiction was ever sought or secured.

A "delinquent act" is defined in relevant part as "[t]he violation of any state law or local ordinance which would constitute a public offense if committed by an adult." Iowa Code § 232.2(12)(a). A "delinquent act" does not constitute a crime ("public offense"). *In re C.D.F.*, 316 N.W.2d 865, 867 (Iowa 1982). A juvenile who is alleged to have committed a delinquent act is therefore not amenable to prosecution for a crime until the juvenile court orders a transfer to district court for prosecution as an adult. *Id.*; *State v. Davis*, 269 N.W.2d 434, 437 (Iowa 1978).

It is important to distinguish this case from *Yodprasit*. In *Yodprasit*, after noting that the district court has subject matter jurisdiction of criminal matters, the supreme court held that an error or irregularity in a juvenile court "waiver" proceeding is only an impediment to the district court's "authority," an impediment which can be waived, and does not result in a lack of subject matter jurisdiction. *Yodprasit*, 564 N.W.2d at 386. In the present case there was no proceeding to "waive" or "transfer" the juvenile court's "exclusive original jurisdiction" of the four "charges" at issue. Under the facts and the foregoing authorities the delinquent

acts were not public offenses, and thus did not fall within the district court's subject matter jurisdiction of criminal matters.

In summary, although the district court has subject matter jurisdiction of criminal matters the legislature determines what acts constitute crimes and thus fall within that jurisdiction; delinquent acts are not crimes, cannot be prosecuted as such, and are not within the district court's subject matter jurisdiction of criminal matters, unless and until the juvenile court waives its "exclusive original jurisdiction" over such acts; the acts involved in the four "charges" at issue in this case fall within the definition of delinquent acts and thus fall outside the general class of criminal cases; no proceedings were held and no order was sought or secured for the waiver or transfer of the juvenile court's "exclusive original jurisdiction"; and the acts involved thus do not fall within the district court's subject matter jurisdiction of criminal proceedings.

SACKETT, C.J. (concurring in part and dissenting in part)

I **would** affirm the district court's judgment and sentence with respect to all of the charges included in the guilty plea. I disagree with the panel's conception of subject matter jurisdiction and conclusion that the district court lacked it in this case.

The panel concluded that the district court had no subject matter jurisdiction over the weapons charges and consequently could not issue a binding judgment and sentence for those lesser charges, even if they were part of the plea agreement. There is simply no authority for the panel's presumption that the "jurisdiction" referred to in Iowa Code section 232.8(1)(c) is specifically subject matter jurisdiction. The only authority we have regarding this issue, *State v. Yodprasit*, 564 N.W.2d 383 (Iowa 1997), suggests that the jurisdiction discussed in section 232.8(1)(c) is, in fact, *not* subject matter jurisdiction.

I agree that the district court must have had subject matter jurisdiction over every charge in order to issue a valid judgment binding on the entire plea agreement. While there may have been a problem with the district court's addressing those charges in this case, no authority indicates that this problem can be construed as an issue of subject matter jurisdiction. Authority indicates only to the contrary. In *State v. Yodprasit*, 564 N.W.2d 383, 385 (Iowa 1997) the court addressed a similar jurisdictional matter arising out of Iowa Code section 232.8(1)(a).¹ Its discussion of the concept of subject matter jurisdiction is instructive:

Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong, not merely the particular case then occupying the court's attention. [Subject matter] jurisdiction flows from the

constitution or from statutes and cannot be conferred by consent, waiver, or estoppel. . . .

The Iowa Constitution confers jurisdiction on the district court concerning criminal matters. Iowa Code section 232.8(1)(a) gives the juvenile court "exclusive original jurisdiction in proceedings concerning a child who is alleged to have committed a delinquent act unless otherwise provided by law." This provision does not deprive the district court of its criminal jurisdiction. Rather, section 232.8(1)(a) merely means that proceedings concerning delinquent acts must originate in juvenile court and continue in juvenile court until that court waives jurisdiction pursuant to Iowa Code section 232.45. *Additionally, section 232.8(1)(a) makes no mention that erroneous waiver decisions deprive the district court of subject matter jurisdiction. Id.*

Following the above analysis of subject matter jurisdiction, the *Yodprasit* court concluded that even when errors in waiver allowed district courts to decide cases which should have remained under the jurisdiction of the juvenile courts under Iowa Code section 232.8(1)(a), these errors could not be categorized as jurisdictional errors. Instead the court considered them judicial errors of authority. Errors of authority, unlike errors of subject matter jurisdiction, are waived by the defendant upon his guilty plea. *Id.* at 385-387.

I recognize that in *Yodprasit* the lesser charges at issue were at least waived by the juvenile court (which had original jurisdiction), and that in this case the lesser claims were never even brought to the juvenile court. I do not believe, however, that this factual distinction is of great consequence. Whether a charge originally within the purview of the juvenile court is adjudicated in district court because of a faulty waiver by the juvenile court or a failure of the district court to transfer it, the same error might occur as a result: the district court may overstep its authority. *See Id.* at 385, 386. The courts have not viewed such an error as fatal.

Case law provides that, unlike errors in subject matter jurisdiction, a defendant waives his challenge to a court's authority once he enters a guilty plea. *Id.* at 385, 386. A guilty plea is a compromise, and the law has provided that surrendering the ability to contest a court's authority is part of that compromise. Given *Yodprasit's* similarity to our case and its well-considered conclusion that subject matter jurisdiction is not at issue in the case, I cannot see how we can invalidate the district court's decision in the case at hand on the basis that the court lacked subject matter jurisdiction.

Furthermore, the panel uses no authority to support its position. After an extended, and what I would consider *relevant* analysis of *Yodprasit*, the panel simply dismisses the case as factually "different" from the case at hand. Thereafter in its opinion, without any offered justification, the panel adopts the appellant's presumption that subject matter jurisdiction is specifically implicated in this case. Again, given the very relevant treatment of jurisdiction with respect to Iowa Code section 232.8(1)(a) in *Yodprasit*, especially considering our lack of authority to the contrary, I cannot see how we can invalidate the district court's decision in the case at hand on the basis that the court lacked subject matter jurisdiction.

I would affirm the district court's ruling entering a guilty plea to charges of possession of methamphetamine with intent to deliver as well as to two counts of carrying weapons. I concur with the panel's conclusion that the district court did not err in imposing the minimum mandatory sentence on the methamphetamine offense.