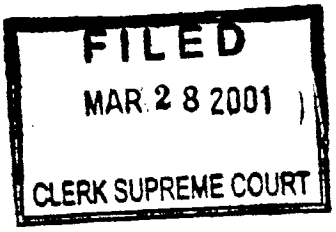
IN THE COURT OF APPEALS OF IOWA

No. 1-25 / 00-523
Filed March 28, 2001

STATE OF IOWA,
Plaintiff,

vs.

IOWA DISTRICT COURT FOR WARREN COUNTY,
Defendant.



Appeal from the Iowa District Court for Warren County, David L. Christensen, Judge.

The State seeks certiorari review of the district court's reconsideration of a criminal sentence. **WRIT ANNULLED IN PART, SUSTAINED IN PART, AND CASE REMANDED.**

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, Kevin Parker, County Attorney, and Ryan Ellis, Assistant County Attorney, for plaintiff.

No appearance for defendant.

Considered by Streit, P.J., and Hecht and Vaitheswaran, JJ.

STREIT, P.J.

The State seeks certiorari review of the district court's decision to reconsider a criminal defendant's sentence and place him on probation. We annul the writ in part, sustain it in part, and remand the case.

I. Background Facts & Proceedings.

Scott Avon pled guilty to manufacturing or conspiracy to manufacture methamphetamine in violation of Iowa Code section 124.401(1)(c)(6). The district court sentenced Avon to an indeterminate term of imprisonment not to exceed ten years. Citing section 124.413, the court stated he would not be eligible for parole until he served a mandatory minimum of one-third of his sentence.[1] The court did not find there were any mitigating circumstances warranting a reduction of Avon's sentence pursuant to section 901.10.[2]

Avon moved to have his sentence reconsidered pursuant to section 902.4.[3] The court suspended Avon's sentence, waived the mandatory one-third

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[1] Section 124.413 provides, in pertinent part, the following:

> A person sentenced pursuant to section 124.401, subsection 1, paragraph "a", "b", "c", "e", or "f", shall not be eligible for parole until the person has served a minimum period of confinement of one-third of the maximum indeterminate sentence prescribed by law.

[2] Section 901.10(1) provides the following:

> A court sentencing a person for the person's first conviction under section 124.406, 124.413, or 902.7 may, at its discretion, sentence the person to a term less than provided by the statute if mitigating circumstances exist and those circumstances are stated specifically in the record.

[3] Section 902.4 provides, in pertinent part, the following:

> For a period of ninety days from the date when a person convicted of a felony, other than a class "A" felony or a felony for which a minimum sentence of confinement is imposed, begins to serve a sentence of confinement, the court, on its own motion or on the recommendation of the director of the Iowa department of corrections, may order the person

minimum, and placed him on probation for three years. The State seeks certiorari review of the court's order.

II. Standard of Review.

A certiorari action is a procedure utilized to test whether a lower board, tribunal, or court exceeded its proper jurisdiction or otherwise acted illegally. Iowa R. Civ. P. 306. The appropriateness of the district court's action in this case turns on the correctness of its construction and application of the statutes noted above. We review for correction of errors at law. Iowa R. App. P. 4; *State v. Vargason*, 607 N.W.2d 691, 695 (Iowa 2000); *State v. Edgington*, 601 N.W.2d 31, 32 (Iowa 1999); *State v. Terry*, 569 N.W.2d 364, 366 (Iowa 1997); *State v. Iowa Dist. Court*, 419 N.W.2d 398, 399 (Iowa 1988).

III. The Merits.

The State claims the district court violated sections 124.413, 901.10, and 902.4. Section 902.4 provides a sentence involving "a felony for which a minimum sentence of confinement is imposed" cannot be reconsidered. The State argues this limitation prohibited the court from reconsidering Avon's sentence because the court initially imposed section 124.413's mandatory minimum sentence without taking the steps necessary to reduce Avon's sentence pursuant to section 910.10. The State argues the court committed further error when it later waived section 124.413's mandatory minimum sentence without

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to be returned to the court, at which time the court may review its previous action and reaffirm it or substitute for it any sentence permitted by law.

stating what mitigating circumstances warranted such a reduction of Avon's sentence. *See* Iowa Code § 901.10(1) (1999).

A. Reconsideration.

Whether the court could reconsider Avon's sentence hinges on whether Avon was convicted of "a felony for which a minimum sentence of confinement is imposed." *Id.* § 902.4. Section 124.413 provides a person convicted pursuant to section 124.401(1)(c) "shall not be eligible for parole until the person has served a minimum period of confinement of one-third of the maximum indeterminate sentence prescribed by law." Section 124.413 is not a sentencing statute—"[i]t is a limitation of the discretion of the Board of Parole." *Luter v. State*, 343 N.W.2d 490, 492 (Iowa 1984); *see also State v. Morehouse*, 316 N.W.2d 884, 886 (Iowa 1982). In other words, it is "relevant only if the court elects to commit an offender for a period of incarceration, and does not affect its discretion to impose another sentence." *State v. Washington*, 356 N.W.2d 192, 197 (Iowa 1984). The section thus does not impose "a minimum sentence of confinement." Nor, technically, can a court impose "a minimum sentence of confinement" pursuant to its provisions. Accordingly, the district court was not prohibited from reconsidering Avon's sentence.

We recognize that, despite the above-cited cases, the Iowa Supreme Court in *State v. Canas*, 571 N.W.2d 20 (Iowa 1997), concluded a defendant sentenced pursuant to 124.401 cannot have his sentence reconsidered because section 124.413 imposes "a minimum sentence of confinement." The court, however, also found "Canas waived objection to reconsideration of his . . . sentence by requesting [the reconsideration]." *Canas*, 571 N.W.2d at 23. Its

conclusion regarding section 124.413 thus was not essential to the holding of the case.

In any event, the *Canas* court appears to have made section 902.4 more restrictive than the legislature intended. Section 902.4 is a "shock probation" statute that has "the obvious purpose of shocking a criminal defendant by a short-term incarceration." *State v. Iowa Dist. Court*, 572 N.W.2d 587, 588 (Iowa 1997). Shock probation only works, of course, when a court can legally lessen a defendant's sentence after he has spent a short stint in prison. Section 902.4 thus expressly prohibits the reconsideration of sentences for "a class 'A' felony" given such sentences must be for life imprisonment and cannot be deferred or suspended. *See* Iowa Code § 902.1. In the same clause, the statute also expressly prohibits the reconsideration of sentences for "a felony for which a minimum sentence of confinement is imposed." Read in context, this latter prohibition most likely encompasses any non-class "A" felony conviction for which a court must imprison the defendant and cannot enter a deferred judgment, deferred sentence, or a suspended sentence. *See id.* § 907.3. Significantly, Avon's conviction does not fall within this category of convictions. *See Morehouse*, 316 N.W.2d at 886. The district court could, therefore, reconsider his sentence.

B. Mitigating Circumstances.

Upon reconsideration of Avon's sentence the court could only "reaffirm it or substitute it for any sentence permitted by law." Iowa Code § 902.4. The court suspended Avon's sentence, waived the mandatory one-third minimum, and placed him on probation for three years. The State argues that, pursuant to

section 910.10, the court could not waive section 124.413's mandatory minimum sentence without stating the pertinent mitigating circumstances in the record.

Section 910.10 provides "[a] court sentencing a person . . . under section . . . 124.413 . . . may, at its discretion, sentence the person to a term less than provided by the statute if mitigating circumstances exist and those circumstances are stated specifically in the record." As we have already discussed, section 124.413 is concerned with parole eligibility, not sentencing. Thus, vis-à-vis section 124.413, section 910.10's purpose apparently "is to allow the court to reduce the period to be served before a person is eligible for parole to something less than the one-third maximum specified in [section 124.413]." 4 Robert R. Rigg and B. John Burns, *Iowa Criminal Law and Procedure* § 1617, at 422 (Supp. 2000). A court can only do this, however, if it states in the record what mitigating circumstances warrant such a reduction. Iowa Code § 901.10(1).

What the district court meant when it stated it was "eliminat[ing] the mandatory minimum one-third requirement of Section 124.413" is unclear. The court could merely have been underscoring that section 124.413 will be inapplicable *as long as* Avon does not violate the terms and conditions of his probation and thus does not get reincarcerated. If this is what the court intended, it did not need to state in the record any mitigating circumstances given it was not waiving the so-called mandatory minimum one-third sentence that will apply if Avon does get reincarcerated. Alternatively, the court could have been stating that, in the event Avon does get reincarcerated, he will be eligible for parole in less than three years despite section 124.413's mandatory minimum sentence. If

this is what the court intended, it should have stated in the record the mitigating circumstances supporting its decision. Iowa Code § 901.10(1).

In summary, we annul the State's writ of certiorari in its challenge to the district court's authority to reconsider Avon's sentence. We sustain the writ in its challenge to the court's substituted sentence and remand the case. If the court intended to waive section 124.413's mandatory minimum sentence in the event Avon's suspended sentence gets reinstated, it must comply with section 901.10's requirements concerning mitigating circumstances.

WRIT ANNULLED IN PART, SUSTAINED IN PART, AND CASE REMANDED.