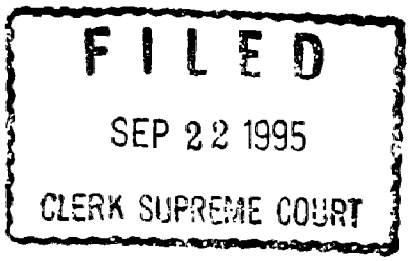
IN THE COURT OF APPEALS OF IOWA

No. 5-450 / 94-2063



STATE OF IOWA,

Plaintiff-Appellee,

vs.

STEPHEN ROBERT DAVIS,

Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Jon Stuart Scoles, Judge.

Stephen Davis appeals from a sentence imposed upon his guilty plea to third-degree burglary in violation of Iowa Code section 713.1 and 713.6A (1993). **VACATED AND REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney General, Paul L. Martin, County Attorney, and Kathleen Selzler, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Habhab and Huitink, JJ.

SACKETT, P.J.

Defendant-appellant Stephen Robert Davis appeals the judgment and sentence entered upon his plea of guilty to burglary in the third degree, in violation of Iowa Code sections 713.1 and 713.6A (1993). He contends the district court imposed an illegal sentence.

Because defendant challenges only the legality of the sentence, we review only to correct errors at law. *State v. Morris*, 416 N.W.2d 688, 689 (Iowa 1987). An illegal sentence may be corrected at any time. *See State v. Austin*, 503 N.W.2d 604, 607 (Iowa 1993).

Pursuant to a plea agreement, defendant agreed to plead guilty on the charge. In exchange, the State agreed to recommend to the trial court defendant be given a suspended sentence. Defendant entered his plea of guilty. It was accepted by the trial court and defendant waived his right to file a motion in arrest of judgment and requested immediate sentencing.

The trial court sentenced defendant to a term of imprisonment not to exceed five years and suspended the sentence and placed him on probation for two years. As a condition of probation, the court ordered defendant to attend a treatment program at the Prairie Ridge Facility in Mason City and, at the completion of the program at Prairie Ridge. defendant was to reside at the BEJE Clark Residential Facility for one hundred eighty days or until he received maximum benefits. Finally, the trial court

ordered defendant be held in the county jail until space became available at Prairie Ridge.

Defendant appeals contending the trial court's order placing him in jail pending space becoming available in a treatment facility was not legal. Defendant contends the court does not have authority to order him to serve time in jail on his felony offense as a condition of probation. Defendant relies on *State v. Tensley*, 334 N.W.2d 764 (Iowa 1983) to support his argument.

Defendant contends Iowa Code section 903.4 (1993) [1] and *State v. Kapell*, 510 N.W.2d 878, 880 (Iowa 1994), further support his position.

Defendant reasons, because the trial court could not sentence him to serve time in the county jail on his felony conviction, the court did not have authority under Iowa Code sections 356A.3 or 356A.6 (1993) to hold him in jail pending his transfer to Prairie Ridge.

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[1] Iowa Code section 903.4 (1993) provides:

> All persons sentenced to confinement for a period of one year or less shall be confined in a place to be furnished by the county where the conviction was had unless the person is presently committed to the custody of the director of the Iowa department of corrections, in which case the provisions of section 901.8 apply. All persons sentenced to confinement for a period of more than one year shall be committed to the custody of the director of the Iowa department of corrections to be confined in a place to be designated by the director and the cost of confinement shall be borne by the state. The director may contract with local governmental units for the use of detention or correctional facilities maintained by the units for the confinement of such persons.

The State advances the district court did not order defendant to serve a portion of his sentence in the county jail as a condition of probation; rather, the district court ordered defendant to remain in the county jail until his transfer to a treatment facility could be arranged. The State contends the trial court has the authority to do this under Iowa Code sections 901.7 [2] and 907.8 [3] (1993), which sections the State

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[2] Iowa Code section 901.7 (1993) provides:

> In imposing a sentence of confinement for more than one year, the court shall commit the defendant to the custody of the director of the Iowa department of corrections. Upon entry of judgment and sentence, the clerk of the district court immediately shall notify the director of the commitment. The court shall make an order as appropriate for the temporary custody of the defendant pending the defendant's transfer to the custody of the director. The court shall order the county where a person was convicted to pay the cost of temporarily confining the person and of transporting the person to the state institution where the person is to be confined in execution of the judgment. The order shall require that a person transported to a state institution pursuant to this section shall be accompanied by a person of the same sex.

[3] Iowa Code section 907.8 (1993) provides:

> A person released on probation shall be assigned to a probation officer. Both the person and the person's probation officer shall be furnished with the conditions of the person's probation including a copy of the plan of restitution and the restitution plan of payment, if any, and the regulations which the person will be required to observe, in writing. The probation officer shall explain these conditions and regulations to the person and shall supervise, assist, and counsel the person during the term of the person's probation.
>
> When probation is granted, the court shall order said person committed to the custody, care, and supervision:
>
> 1 Of any suitable resident of this state; and
>
> 2 Of the judicial district department of correctional services.
>
> Jurisdiction of these persons shall remain with the sentencing court.
>
> In each case wherein the court shall order said person committed to the custody, care, and supervision of the judicial district department of

advances show a legislative intent to authorize the district court to provide for a defendant's temporary custody before he is released to the supervision of the Department of Corrections.

In *Tensley*, 334 N.W.2d at 764, the court said:

> (a) under our holding in *State v. Harris*, 251 N.W.2d 483, 484 (Iowa 1977), granting probation and imposing confinement are mutually exclusive, except where expressly authorized by statute; and (b) to the extent that a split sentence of probation and confinement is now authorized by our present sentencing code such authorization does not permit confinement in a county jail.

Id. Consequently, the focal question is whether there is an express authorization by statute to impose the confinement in the county jail. If the trial court's sentence is not authorized by statute, it is void. *Kapell*, 510 N.W.2d at 879; *Overton v. State*, 493 N.W.2d 857, 859 (Iowa 1992).

> correctional services, the clerk of the district court shall at once furnish the director of the judicial district department of correctional services with certified copies of the indictment or information, the minutes of testimony attached thereto, the judgment entry if judgment is not deferred, and the original mittimus. The county attorney shall at once advise the director, by letter, that the defendant has been placed under the supervision of the judicial district department of correctional services and give the director a detailed statement of the facts and circumstances surrounding the crime committed and the record and history of the defendant as may be known to the county attorney. If the defendant is confined in the county jail at the time of sentence, the court may order the defendant held until arrangements are made by the judicial district department of correctional services for the defendant's employment and the defendant has signed the necessary probation papers. If the defendant is not confined in the county jail at the time of sentence, the court may order the defendant to remain in the county wherein the defendant has been convicted and sentenced and report to the sheriff as to the defendant's whereabouts.

The statutes which the State reference do not provide express authority for the confinement in the county jail under these circumstances. Consequently, we must agree with defendant ordering him to the county jail was not authorized by statute. We vacate the sentence imposed and remand for resentencing.

VACATED AND REMANDED FOR RESENTENCING.

Huitink, J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. I would affirm the trial court. The issue is relatively simple. Its impact on the trial bench, however, is significant. A short recitation of the facts is necessary.

The defendant pled guilty to burglary in the third degree. He was sentenced to a term of imprisonment not to exceed five years. His sentence was suspended and he was placed on probation for two years.

The defendant admittedly has a substance abuse problem. His attorney, during the sentencing proceedings, advised the court that arrangements had been made for the defendant's entry into an in-patient substance abuse treatment program. His attorney also advised the court that the defendant's admission to Prairie Ridge was scheduled for "next Monday, December 19."

The court, as a condition of his probation, ordered the defendant to attend a treatment program at the Prairie Ridge Facility in Mason City; and upon the completion of that program, he is to reside at the BEJE Clark Residential Facility for 180 days or until he receives maximum benefits. The trial court ordered the defendant held in the county jail "pending space availability" at Prairie Ridge. He had been in custody in the county jail since October 31.

The defendant, on appeal, contends the trial court "was without authority to order the defendant to serve time in the county jail as a condition of probation." The position of the defendant is misplaced because the trial judge did not order the

defendant to serve time in the county jail as a condition of probation. Rather, the court merely ordered that the defendant should not be released from the county jail until he could be committed to the treatment center.

The case of *State v. Tensley*, 334 N.W.2d 764 (Iowa 1983) is easily distinguished from the facts in this case. In *Tensley*, the court expressly ordered the defendant to serve 180 days in the county jail as a condition of probation. *Tensley*, 334 N.W.2d at 764. Rather obviously, the trial court was without authority to do this. *Id.* at 765.

However, here the trial judge did not sentence the defendant to serve a term in the county jail. He simply ordered the defendant held in jail until he could be committed to the treatment facility. The circumstances here are not unlike those where a defendant is held in a county jail pending transportation to a designated reception center, nor are they unlike circumstances where a defendant was held pending arrangements for an out-of-state transfer. *See State v. Snyder*, 336 N.W.2d 728, 731 (Iowa 1983).

I agree with the State there is legislative authority for this action. I would affirm.