FILED
JUN 25 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

446

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

JOHN LESLIE DANIEL,)

Defendant-Appellant.)

Filed June 25, 1985

5-161
84-1086

Appeal from the Iowa District Court for Marshall County - Sandra J. Holien, Judge.

Defendant appeals from the sentence imposed on his conviction of assault, as defined in Iowa Code sections 708.1(1) and 708.2(2), a serious misdemeanor. SENTENCE AFFIRMED AS MODIFIED.

Charles Harrington, Chief Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Joseph P. Weeg, Assistant Attorney General, for plaintiff-appellee.

Heard by Snell, P.J., and Hayden and Sackett, JJ.

PER CURIAM

Defendant appeals from the sentence imposed on his conviction of assault, as defined in Iowa Code sections 708.1(1) and 708.2(2), a serious misdemeanor. At the sentencing proceeding, the district court orally sentenced defendant to jail "for a period of 270 days." However, in its written judgment, the district court sentenced defendant to jail "for a period not to exceed 270 days." Defendant asserts that the district court improperly imposed an indeterminate sentence on a misdemeanor conviction; he asks the appellate court to vacate the sentence and remand the case for resentencing, or in the alternative, to remand the case and direct the district court to correct the sentencing error via the procedure set out in State v. Suchanek, 326 N.W.2d 263 (Iowa 1982). The State concedes that the sentence is improper, but it asks the appellate court to correct the error by modifying the sentence on appeal, as was done in State v. White, 337 N.W.2d 517 (Iowa 1983).

It is undisputed that the written judgment sentencing the defendant to jail "for a period not to exceed 270 days" is an indeterminate sentence and thus improper under 708.2(2) which requires the court to impose a determinate sentence. The sole issue is whether the case should be remanded for resentencing or whether this court should modify the sentence to conform with the sentence given at the sentencing hearing.

In State v. Suchanek, supra, involving a similar question, the court stated that the case should be remanded when the oral pronouncement, which was statutorily correct, differed from the written judgment, and when it was unclear whether the erroneous sentence in the written judgment was a clerical error that could be corrected by a nunc pro tunc order or whether it was intentional.

In State v. White, supra, the court distinguished Suchanek, and found that they had the power to modify the written judgment, under Iowa Code section

814.20. The court concluded that this modification was proper because the discrepancy did not create a complicated matter.

In this case, it appears that the court inadvertently added the words "not to exceed." Under the authority granted to this court in Iowa Code section 814.20, we modify the district court order to make it comply with applicable statute.

SENTENCE AFFIRMED AS MODIFIED.