IN THE COURT OF APPEALS OF IOWA

No. 1-680 / 01-0035
Filed November 28, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DEMARQUIS LAZELLE FORNEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower, Judge.

Demarquis Lazelle Forney appeals from the sentence imposed following his guilty plea to possession of cocaine with intent to deliver (second offense) in violation of Iowa Code section 124.401(1)(c) (1999). **SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Jack Lammers, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Mahan and Hecht, JJ.

MAHAN, J.

Defendant Demarquis Lazelle Forney appeals from the sentence imposed following his guilty plea to possession of cocaine with intent to deliver (second offense) in violation of Iowa Code section 124.401(1)(c). He contends the court abused its sentencing discretion by considering an improper sentencing factor – the impact parole would have on the amount of time he would serve if the sentence were imposed concurrently versus consecutively with the sentences in another case. We vacate the sentence on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

We review a district court's sentencing decision either for abuse of discretion or for a defect in sentencing procedure, such as the district court's consideration of impermissible sentencing factors. *State v. Gonzalez*, 582 N.W.2d 515, 516 (Iowa 1998). A court's consideration of the timing of parole is an impermissible sentencing factor. *State v. Remmers*, 259 N.W.2d 779, 785 (Iowa 1977). Under Iowa's correctional scheme, it is the parole board's prerogative to determine the minimum length of a defendant's sentence. *Id.* Where improper factors are considered, a sentence must be vacated and the case remanded for resentencing. *State v. Sinclair*, 582 N.W.2d 762, 765 (Iowa 1998).

In sentencing Forney to serve a term of imprisonment not to exceed twenty years with one-third mandatory minimum to apply, the court stated:

> So the difference is about ten months, at least from what we've been told by the parole board, and, um, that is a long time. If you think back ten months ago we're talking about, um, September, September or October, Halloween roughly, and that's a long time,

> but it's going to give you an opportunity to realize that if you keep selling drugs, you're going to keep going back to prison.

The State argues the court's comment on the extra time as a consequence of the sentence was made for other reasons. However, the important focus of our review is whether an improper sentencing factor crept into the proceedings; not the result it may have produced or the manner it may have motivated the district court. *See State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). It is inappropriate to circumvent parole considerations in a judicial sentencing decision. *Id.* The statement by the district court in this case cannot be overlooked as an insignificant or misconstrued remark. The remark by the district court expressed the notion that a fifteen-year prison sentence was rejected because that sentence would result in an earlier parole date for Forney. The judge's calculations of Forney's minimum sentence specifically implicated the prerogatives of both the parole board and the department of corrections. This was an improper sentencing consideration.

The fact that the court also considered other permissible factors in sentencing Forney does not make the court's reliance on this impermissible consideration of no consequence. *See Remmers*, 259 N.W.2d at 784-85. Accordingly, we are required to vacate the sentence and remand for resentencing.

SENTENCE VACATED AND REMANDED FOR RESENTENCING.

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