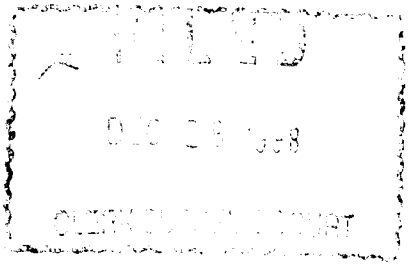
IN THE COURT OF APPEALS OF IOWA

No. 8-620 / 97-1830
Filed December 28, 1998

STATE OF IOWA,
Appellee,
vs.

JEFFREY WADE SCHWORN,
Appellant.



Appeal from the Iowa District Court for Johnson County, David M. Remley, Judge.

Jeffrey Schworn appeals from his convictions for aiding and abetting false imprisonment, assault causing bodily injury, and assault with intent to cause serious injury. **JUDGMENT OF CONVICTION AFFIRMED, SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and Stephan Japuntich and Christopher Cooklin, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, J. Patrick White, County Attorney, and Janet L. Lyness, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ.

HUITINK, J.

Jeffrey Schworn appeals from his convictions for aiding and abetting false imprisonment, assault causing bodily injury, and assault with intent to cause serious injury. We affirm the judgment of conviction, but vacate the sentences and remand for resentencing.

I. Background Facts and Proceedings.

Jeffrey Schworn pled guilty to aiding and abetting false imprisonment, and assault causing bodily injury, both serious misdemeanors, and assault with intent to cause serious injury, an aggravated misdemeanor.

Schworn was sentenced to concurrent one-year sentences in the county jail on the serious misdemeanor charges. He was also ordered to pay the mandatory minimum $250 fine for both serious misdemeanor charges. With respect to the aggravated misdemeanor charge, Schworn was sentenced to an indeterminate term not to exceed two years. This sentence was to be served consecutive to the sentences imposed on the serious misdemeanor charges.[1] The district court suspended the aggravated misdemeanor sentence, and ordered Schworn to reside for up to one year in Hope House, a community-based residential correctional facility, as a condition of his probation. Additionally, on the aggravated assault charge, the court imposed a $500 fine which it referred to as mandatory.

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[1] Schworn was committed to the custody of the director of the Iowa Department of Corrections for this portion of his sentence.

Schworn appeals. He asserts three bases of error in the district court's sentencing decision: (1) the court imposed an illegal sentence by not committing him to the department of corrections when his sentences of confinement exceeded one year in length; (2) the court erred in sentencing him to a simultaneous term of jail and probation on the aggravated misdemeanor charge; and (3) the court failed to exercise its discretion in imposing a fine on the aggravated misdemeanor charge under Iowa Code section 903.1.

II. Standard of Review.

We review the court's sentence for correction of errors at law. *State v. Kapell*, 510 N.W.2d 878, 879 (Iowa 1994).

III. Error Preservation.

The State contends in his written guilty plea and at his sentencing hearing Schworn agreed to serve a period of time in the Hope House and cannot now challenge that portion of his sentence. The State also claims Schworn agreed to pay $1000 in mandatory fines and cannot now challenge them on appeal.

Traditional error preservation rules, however, are not ordinarily applicable to void, illegal or procedurally defective sentences. *State v. Ceaser*, 585 N.W.2d 192, 195 (Iowa 1998); *State v. Hochmuth*, 585 N.W.2d 234, 237 (Iowa 1998). Traditional error preservation principles are incongruous to the sentencing process. *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa App. 1994). The sentence is pronounced and the reasons for the sentence are expressed only *after* the defendant and counsel have

had an opportunity to address the trial judge. *See* Iowa R. Crim. P. 22(3). There is no procedure which allows the defendant to address the court during or after the pronouncement of sentence, and there is no rule which expressly requires the claim of an improper or illegal sentence to be submitted to the trial court prior to an appeal. *State v. Young*, 292 N.W.2d 432, 435 (Iowa 1980). We reject the State's position on this matter.

IV. Imposition of Sentence.

A. Place of Confinement.

Schworn asserts the district court erred by designating the county jail as the place of confinement for his consecutive terms of incarceration, which together totaled over one year of imprisonment. *See* Iowa Code §§ 901.8, 903.4 (1997). The State maintains there was no error because the district court suspended part of Schworn's sentence and imposed probation in lieu of confinement. In light of the supreme court's recent decision in *State v. Patterson*, 586 N.W.2d 83 (Iowa 1998), we agree with Schworn, affirm the judgment, but vacate the sentence and remand for resentencing.

The district court sentenced Schworn to two concurrent one-year sentences in the Johnson County Jail for the two serious misdemeanor charges. It also sentenced him to an indeterminate two-year period of incarceration for the aggravated misdemeanor charge, to be served consecutively with the other sentences. The court

suspended the sentence for the aggravated misdemeanor and placed Schworn on probation for two years.

We hold the district court erred in not designating the proper place of confinement. *See* Iowa Code §§ 903.4, 901.8. When Schworn's consecutive sentences are added together, as required by section 901.8, they total 1095 days. This exceeds the one-year period referred to in section 903.4. Under section 903.4, Schworn's sentences should be served in the custody of the director of the department of corrections.

Under the rule announced in *Patterson*, the fact the district court suspended the consecutive sentence does not alter its character as a sentence of confinement. *Patterson*, 586 N.W.2d at 84. Under the sentencing scheme, Schworn will not be actually confined unless his probation is revoked. The district court, however, still must designate the proper place of confinement in the event his probation is revoked. The proper place of confinement was in the custody of the director of the department of corrections.

B. Imposition of Fine for Aggravated Misdemeanor.

Schworn contends the district court erred in imposing what it termed to be a mandatory fine of $500 for the aggravated misdemeanor count. As we are remanding this cause for resentencing in its entirety, we make no determination of whether the district court exercised its discretion in imposing the fine for the aggravated misdemeanor count. We note, however, Iowa Code section 903.1(2), the sentencing

provision at issue, does not contain any language which limits the sentencing court's discretion, and section 903.1(2) "must be read in *pari materia* with the Code's general sentencing provisions." *State v. Chana*, 476 N.W.2d 38 (Iowa 1991). *See also State v. Hildebrand*, 280 N.W.2d 393, 397 (Iowa 1979)(the use of the word "shall" in a sentencing statute does not require the trial court to impose a jail sentence; rather the court must exercise its discretion in deciding whether to impose the minimum sentence).

We have considered Schworn's argument that the district court improperly sentenced him to a simultaneous term of probation and incarceration with regard to the portion of his sentence at Hope House, a community-based residential correctional facility under the Sixth Judicial District Department of Corrections. We find his position to be without merit. *See* Iowa Code § 907.3(3); *State v. Tensley*, 334 N.W.2d 764, 764-65 (Iowa 1983).

We affirm the judgment entered upon Schworn's convictions, but vacate his sentences and remand for resentencing. We do not mean by this decision to suggest what the new sentence should be.

JUDGMENT OF CONVICTION AFFIRMED, SENTENCE VACATED AND REMANDED FOR RESENTENCING.