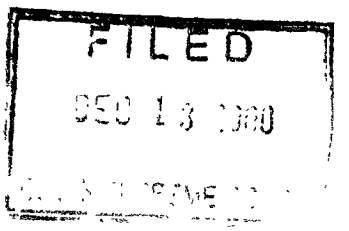
IN THE COURT OF APPEALS OF IOWA

No. 0-658 / 00-0322
Filed December 13, 2000



STATE OF IOWA,
Plaintiff,

vs.

IOWA DISTRICT COURT
FOR MUSCATINE COUNTY,
Defendant.

Appeal from the Iowa District Court for Muscatine County, Patrick J. Madden, Judge.

The State petitioned for certiorari, which was granted, and appealed the district court's grant of a deferred judgment allowing Ezra Barnett to plead guilty to conspiracy to commit forgery in violation of Iowa Code sections 706.1 and 715A.2 (1999). The State asserts the court erred in deferring judgment in violation of Iowa Code section 907.3(1)(b) due to a prior conviction in the State of Texas. **WRIT SUSTAINED, SENTENCE VACATED, AND REMANDED.**

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Richard R. Phillips, County Attorney, and Kerrie Snyder, Assistant County Attorney, for plaintiff.

Douglas E. Johnston, Muscatine, for defendant.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

MILLER, J.

Certiorari was granted to test the legality of the district court's grant of a deferred judgment to Ezra Barnett after he pled guilty to conspiracy to commit forgery, in violation of Iowa Code sections 706.1 and 715A.2 (1999). The State asserts the district court acted illegally in deferring judgment. It asserts that deferral of judgment violated Iowa Code section 907.3(1)(b), due to Barnett's prior felony conviction in the State of Texas. We sustain the writ, vacate the sentence, and remand for further proceedings.

I. BACKGROUND FACTS AND PRIOR PROCEEDINGS

The State charged Ezra Barnett with forgery and conspiracy to commit forgery. These charges arose from Barnett's involvement in the cashing of a payroll check which did not belong to him. Barnett pled guilty to the conspiracy charge in exchange for the dismissal of the forgery charge. At the sentencing hearing the district court granted Barnett's request for a deferred judgment and placed him on probation for two years. After the court had pronounced the sentence, but prior to the sentencing record being closed, the State brought to the court's attention that Barnett's pre-sentence investigation ("PSI") report listed his prior conviction in Texas as a felony.

The State objected to the deferral of judgment, arguing Barnett was ineligible for deferral under Iowa Code section 907.3(1)(b) because of his prior felony conviction. The court allowed the deferred judgment to stand, stating the previous Texas felony conviction did not preclude granting of a deferred judgment to Barnett because the crime he was convicted of in Texas would not

be a felony in Iowa.[1] In making its determination the court relied on its interpretation of the Iowa Supreme Court's ruling in *State v. Sanborn*, 564 N.W.2d 813 (Iowa 1997).

The State filed a petition for writ of certiorari pursuant to Iowa Rules of Appellate Procedure 301 and 303, alleging that by deferring judgment the court had violated Iowa Code section 907.3(1)(b). The State asserted the district court erred in relying on *Sanborn* for the proposition that the Texas felony did not preclude granting Barnett a deferred judgment. The supreme court granted the State's petition for writ of certiorari.

The defendant contends the State waived the issue of Barnett's alleged ineligibility for deferred judgment when it failed to raise the issue prior to imposition of the sentence. The defendant also asserts that because the State did not provide a copy of the appropriate statute under which Barnett was allegedly convicted, or any other proof that the conviction was in fact a felony in Texas other than the notation on the PSI report, the State did not meet its burden to prove Barnett was previously convicted of a felony.

II. STANDARD OF REVIEW

We review the trial court's interpretation of applicable statutes for correction of errors of law. *State v. Casey's General Stores, Inc.*, 587 N.W.2d 599, 601 (Iowa 1998). We are not bound by the district court's determinations.

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[1] According to the PSI report, Barnett was previously convicted for the unauthorized use of a motor vehicle in Texas in 1998. The PSI report stated this was a felony offense. Barnett received two years confinement in jail which was suspended, five years community supervision, and was ordered to pay several fines and restitution as well as perform 120 hours of community service for the offense.

State v. Francois, 577 N.W.2d 417, 417 (Iowa 1998). An illegal sentence is void and can be corrected at any time. Iowa R. Crim. P. 23(5)(a); *State v. Woody*, 613 N.W.2d 215, 217 (Iowa 2000).

III. MERITS

Iowa Code section 907.3(1) authorizes deferral of judgment, but also provides several circumstances under which a deferred judgment is not allowed. One such circumstance is when

> The defendant previously has been convicted of a felony. "*Felony*" means a conviction in a court of this or any other state or of the United States, of an offense classified as a felony by the law under which the defendant was convicted at the time of the defendant's conviction.

Iowa Code § 907.3(1)(b)(1999). The PSI report in this case clearly indicated that Barnett was convicted of a "felony offense" in Texas in 1998. Defense counsel stated to the court at the start of the sentencing proceedings that he had reviewed the PSI report and there were no changes necessary.

A PSI report is required to include the defendant's criminal record. Iowa Code § 901.3(2)(1999). Here Barnett did not claim the criminal record portion of the PSI report was inaccurate and did not object to it in any way. Therefore the sentencing court properly considered, as it should have, these unchallenged matters in Barnett's PSI report. *See* Iowa Code § 901.5; *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998) (citing *State v. Townsend*, 238 N.W.2d 351, 358 (Iowa 1979)); *see also State v. Gonzales*, 582 N.W.2d 515, 517 (Iowa 1998); *State v. Peters*, 525 N.W.2d 854, 859-60 (Iowa 1994).

The district court's reliance on *Sanborn* was misplaced. In *Sanborn* the defendant was convicted of being a felon in possession of a firearm, in violation of Iowa Code section 724.26. *Sanborn*, 564 N.W.2d at 814. Iowa Code section 724.25(1) defines "felony" for purposes of section 724.26. It provides:

> As used in section[ ] . . . 724.26, the word "felony" means any offense punishable in the jurisdiction where it occurred by imprisonment for a term exceeding one year, but does not include any offense, other than an offense involving a firearm or explosive, classified as a misdemeanor under the laws of the state and punishable by a term of imprisonment of two years or less.

Iowa Code § 724.25(1)(1999). Based on this statute the supreme court in *Sanborn* concluded that if the predicate felony underlying the prosecution for a violation of section 724.26 occurs in another state, "that state's punishment must satisfy the Iowa definition." *Sanborn*, 564 N.W.2d at 816. The court went on to hold that merely presenting a photocopy of a newer version of the Florida statute under which the defendant was convicted was not sufficient to prove the prior felony when the defendant's prior felony status is an element of the offense charged. *Sanborn*, 564 N.W.2d at 816-17.

The defendant's status as a prior felon is not an essential element of the charge of conspiracy to commit forgery, the crime Barnett was convicted of here. Therefore, the test set forth in *Sanborn* for proving a prior felony is not applicable here. Furthermore, the definition of "felony" in Code section 724.25(1) by its own explicit terms is applicable only to sections 724.8(2) and 724.26, neither of which are involved in this case. Therefore, the definition of felony which should have been applied by the district court here is found in Code section 907.3(1)(b). Under this Code provision a defendant's previous conviction should be

considered a "felony" if it was classified as such "by the law under which the defendant was convicted at the time of the defendant's conviction." Iowa Code § 907.3(1)(b)(1999). For purposes of section 907.3(1)(b), the crime for which a defendant was previously convicted does not have to carry sanctions that would make it a felony in Iowa. The district court erred in relying on *Sanborn* and thus in its determination that Barnett was eligible for a deferred judgment.

Barnett's argument that the information on his prior conviction in the PSI report could not be considered because it is hearsay is not persuasive. Sentencing hearings need not conform with all of the requirements of a criminal, or even the usual administrative, hearing. *State v. Ashley*, 462 N.W.2d 279, 281 (Iowa 1990) (citing *Kent v. United States*, 383 U.S. 541, 562, 86 S. Ct. 1045, 1057, 16 L. Ed. 2d 84, 98 (1966)).

> The procedure in the sentencing process is not the same as that in the trial process. It is a fundamental principle that a person accused of a crime shall not be convicted unless he is given reasonable notice of the charge and an opportunity to be heard in his defense and to examine adverse witnesses. But the sentencing judge may consider information, even though obtained outside the courtroom, from persons whom the defendant has not been permitted to confront or cross-examine.

State v. Delano, 161 N.W.2d 66, 70-71 (Iowa 1968) (quoting *Driver v. State*, 201 Md. 25, 92A.2d 570, 573-74 (Md. App. 1952)); *see also* Iowa R. Evid. 1101(c)(4) (stating that the rules of evidence, other than the rule with respect to privilege, do not apply to certain proceedings, including sentencing). Therefore, whether the statements in the PSI report were hearsay is not of significance.

We conclude that the district court's interpretation of *Sanborn* and its determination that Barnett was eligible for a deferred judgment were incorrect, and that its grant of a deferred judgment was in violation of Iowa Code section

907.3(1)(b) and thus was an illegal sentence. We therefore sustain the writ of certiorari, vacate Barnett's sentence, and remand the case to the district court for further proceedings consistent with this opinion.

WRIT SUSTAINED, SENTENCE VACATED, AND REMANDED.