

IN THE COURT OF APPEALS OF IOWA

FILED

AUG 23 1989

CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

RANDY LEE THOMPSON,)

Defendant-Appellant.)

865

9-287
88-1504

Appeal from the Iowa District Court for Wayne County
(CR 21090), George W. Bergeson, Judge.

Defendant appeals from a district court decision
ordering the revocation of his driver's license for
Operating While Intoxicated. **AFFIRMED IN PART, VACATED IN
PART, AND REMANDED.**

Scot M. Halverson, Leon, for the defendant-appellant.

Thomas J. Miller, Attorney General; Mark Joel
Zbieroski, Assistant Attorney General; and Alan W. Wilson,
County Attorney, for the plaintiff-appellee.

Considered by Donielson, P.J., and Schlegel and
Sackett, JJ.

SACKETT, J.

Defendant Randy Lee Thompson appeals following a judgment convicting him of operating a motor vehicle while intoxicated, first offense. Defendant contends the trial court erred in amending its judgment to order the Department of Transportation to revoke his driver's license for a period of six years.

The defendant was convicted as a result of a guilty plea entered to fulfill his part of a plea bargain agreement. In return, the State withdrew an amended trial information that offered proof of a previous OWI conviction and would thus have enhanced the charge to OWI, second offense.

The trial court entered judgment convicting defendant of OWI, first offense, on August 8, 1988. On September 13 the State filed an application for an amended judgment and sentence. The application alleged defendant had OWI convictions in both 1979 and 1986. Based on this application, the court, in a nunc pro tunc order, modified its sentence to include an order to the Department of Transportation to revoke defendant's license for six years, as provided by Iowa Code section 321J.4(3)(a).

The defendant contends that the district court lacked the authority to deal with mandatory license revocation in a nunc pro tunc order. He also contends that he was denied due process because he was given no evidentiary hearing as

to the length of the mandatory license revocation. Finally, the defendant argues that the State violated the plea agreement by seeking the enhanced period of revocation. Defendant also makes other claims that need not be addressed at this time, in light of our disposition of the case.

Our scope of review is for errors at law, Iowa R. App. P. 4, except as to the due process claim, for which our review is de novo. State v. Schubert, 346 N.W.2d 30, 32 (Iowa 1984). We affirm the defendant's conviction for OWI, but vacate that part of the judgment ordering the revocation of his license. We remand to the district court for further proceedings consistent with this opinion.

The defendant's first argument is the district court did not have authority to enter a nunc pro tunc order modifying the judgment. A nunc pro tunc order is an order to make the record accurately reflect an earlier action by the court. It is not an order to correct an error of fact or law by the court. McVay v. Kenneth E. Montz Implement Co., 287 N.W.2d 149, 150-51 (Iowa 1980). The action by the trial court here goes beyond correcting an obvious error. It is a modification of a finding of fact and an amendment to an earlier sentence. We set aside the nunc pro tunc order.

Defendant next contends he was deprived of notice and the opportunity to be heard on the State's ex parte motion,

and thus was denied due process of law under both the Iowa Constitution and the United States Constitution. The State argues notice and hearing are not required because there is no dispute between the parties concerning relevant or material adjudicative facts. See Allegre v. Iowa State Board of Regents, 349 N.W.2d 112, 115-16 (Iowa 1984); Picard v. State, 339 N.W.2d 368, 373 (Iowa 1983).

The defendant contends the plea bargain provided the State would not introduce evidence of prior convictions at any stage of the proceeding. The State asserts the agreement only pertained to the sentencing under section 321J.2 and not the license revocation under section 321J.4. Defendant also asserts the State was estopped from requesting resentencing because of the plea bargain agreement.

We find there is insufficient information in the record to determine what the plea agreement was and whether the State breached it. The terms of a plea agreement must be disclosed in open court at the time the plea is offered. Iowa R. Crim. P. 8(2)(c), 9(2). This was not done. We remand to the district court to take further evidence and to determine whether the plea bargain agreement prevented the State from requesting resentencing as to license revocation, based upon the defendant's prior OWI convictions.

We affirm the trial court's sentence as it pertains to defendant's conviction for OWI under Iowa Code section 321J.2(2)(a). We vacate that part of the sentence which orders the revocation of defendant's driver's license under section 321J.4(3)(a). We remand to the district court.

Costs on appeal are taxed one-half to the State and one-half to defendant.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.