

IN THE COURT OF APPEALS OF IOWA

No. 3-610 / 13-1311
Filed September 18, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSHUA SCOTT PEARSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Marion County, Paul R. Huscher (guilty plea) and Darrell Goodhue (sentencing), Judges.

Defendant appeals his conviction and sentence on two counts of sexual abuse in the third degree. **VACATED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Dennis Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Benjamin Parrott, Assistant Attorney General, and Ed Bull, County Attorney, for appellee.

Considered by Eisenhauer, C.J., Tabor, J., and Sackett, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

SACKETT, S.J.

Appellant Joshua Scott Pearson pleaded guilty to two counts of sexual abuse in the third degree, in violation of Iowa Code section 709.4(2)(c)(4) (2011). The district court entered judgment and sentence against him for violating two counts of Iowa Code section 709.4(2)(b). Pearson on appeal contends that this court should remand to the district court to correct a mistake of law in the judgment. The State concedes the error was made and it should be corrected on remand. However, the State argues it should be corrected by a nunc pro tunc order. We disagree with the State's position and vacate the judgment and sentence on Iowa Code section 709.4(2)(b) and remand to the district court to allow the district court to amend the judgment and sentence to reflect the defendant's intent in entering the plea.

Background. On April 17, 2012, Pearson pleaded guilty to two counts of sexual abuse in the third degree, in violation of Iowa Code section 709.4(2)(c)(4). He was charged with committing a sex act with a fifteen-year-old female and there was a written stipulation confirming the female's birth date and Pearson's birth date.

Pearson appeared for sentencing on June 8, 2012. The sentencing court recognized the victim was a fifteen-year-old girl. In a judgment and sentence order filed on June 8, 2012, the court entered judgment against Pearson for two counts of violating Iowa Code section 709.4(2)(b), which section criminalizes a sex act with a twelve or thirteen year old. Iowa Code section 709.4(2)(c)(4) is not

a forcible felony. See Iowa Code § 702.11(2)(c). Iowa Code section 709.4(2)(b) is a forcible felony. Pearson appealed on June 13, 2012.

Discussion. It is agreed that there should be a remand to the district court. The only question is whether the district court should be directed to correct a mistake of law or to enter an order nunc pro tunc to correct a clerical error.

In support of his position Pearson relies primarily on *State v. Johnson*, 744 N.W.2d 646, 649 (Iowa 2008). The State argues that we should follow the course of the court in *State v. Hess*, 533 N.W.2d 525, 527 (Iowa 1995), and affirm the judgment and remand to the district court with instruction to correct what the State argues is a clerical error. Pearson disagrees contending a court may not use a nunc pro tunc order “for the purpose of correcting judicial thinking, a judicial conclusion or mistake of law.”

In *Johnson*, 744 N.W.2d at 648-49, the court said:

[T]he function of a nunc pro tunc order is “to make the record show truthfully what judgment was actually rendered--not an order now for then, but to enter now for then an order previously made.” *Gen. Mills, Inc. v. Prall*, 244 Iowa 218, 225, 56 N.W.2d 596, 600 (1953) (quoting *Chariton & Lucas County Nat'l Bank v. Taylor*, 213 Iowa 1206, 1208, 240 N.W. 740, 741 (1932)). A court may not use a nunc pro tunc order “for the purpose of correcting judicial thinking, a judicial conclusion or a mistake of law.” *Headley v. Headley*, 172 N.W.2d 104, 108 (Iowa 1969). In reviewing a nunc pro tunc order, this court has declared that the intent of the trial judge is critical. *McVay v. Kenneth E. Montz Implement Co.*, 287 N.W.2d 149, 151 (Iowa 1980).

When a court imposes a sentence which statutory law does not permit, the sentence is illegal, and such a sentence is void and we will vacate it. *Hess*, 533 N.W.2d at 527; *State v. Suchanek*, 326 N.W.2d 263, 265 (Iowa 1982). However,

when a judgment entry incorrectly differs from the oral rendition of the judgment merely as a result of clerical error, the trial court holds the inherent power to correct the judgment entry so that it will reflect the actual pronouncement of the court. *State v. Harbour*, 37 N.W.2d 290, 293-94 (Iowa 1949). The district court may correct a clerical error in a judgment entry through issuance of a nunc pro tunc order. *Id.* 293.

An error is clerical in nature if it is not the product of judicial reasoning and determination. *Hess*, 533 N.W.2d at 527. When judicial intent is unclear, a remand should issue for an evidentiary hearing for the court to determine the proper method of correcting the defective written sentence. *Id.*; *Suchanek*, 326 N.W.2d at 266. If the record unambiguously reflects that a clerical error has occurred, the district court should be ordered to enter a nunc pro tunc order on remand to correct the judgment entry. *See Hess*, 533 N.W.2d at 527.

A rule of nearly universal application is that “where there is a discrepancy between the oral pronouncement of sentence and the written judgment and commitment, the oral pronouncement of sentence controls.” *Id.* at 528. The universal rule does not appear to be applicable here. The oral pronouncement of the sentence here was to charges Pearson had not pleaded guilty to, nor was there any evidence to support a finding Pearson had violated that code section.

However, the sentencing court in sentencing Pearson was told that Pearson had pled guilty on April 17, 2012, to two counts of sexual abuse in the third degree, in violation of Iowa Code section 709.1 and 709.4(2)(b), and the court acknowledged that the major question was whether the sentences should

be consecutive or concurrent. The court determined the sentences should run concurrently. The court noted the victim was a fifteen-year-old girl and there is nothing in the record to suggest that the court believed Pearson had a younger victim.

This case appears to be more akin to *State v. Garrett*, 516 N.W.2d 892 (Iowa 1994). There the defendant was charged with criminal trespass, and the elements of that charge were properly submitted to the jury. *Garrett*, 516 N.W.2d at 894. The jury returned a verdict against the defendant on criminal trespass but the verdict form for this count was mistakenly labeled “criminal mischief.” *Id.* Despite this error, the court entered a judgment of conviction and sentence for criminal trespass. *Id.* The defendant challenged the sentence as illegal on the ground that he was convicted of criminal mischief, although he was not charged with criminal mischief, and was sentenced for criminal trespass, even though he was not convicted of criminal trespass. *Id.* The court held that the district court had the authority to ignore the clerical error, since the jury’s intention to convict the defendant of criminal trespass was clear and unambiguous, but the court should have amended the verdict form before entering a sentence. *Id.* at 896. The court also concluded the proper remedy was to vacate the sentence on criminal trespass and remand to allow the district court to amend the verdict form to reflect the jury’s actual intent and to enter a new sentence on the amended verdict. *Id.*

We vacate the judgment and sentence on Iowa Code section 709.4(2)(b) and remand to the district court to allow the district court to amend the judgment.

VACATED AND REMANDED.