

IN THE COURT OF APPEALS OF IOWA

No. 6-813 / 05-1472
Filed November 30, 2006

STATE OF IOWA,
Plaintiff,

vs.

**IOWA DISTRICT COURT FOR
HARRISON COUNTY,**
Defendant.

STATE OF IOWA,
Plaintiff-Appellant,

vs.

THOMAS MORGAN DONELSON,
Defendant-Appellee.

Appeal from the Iowa District Court for Harrison County, James M. Richardson, Judge.

The State of Iowa challenges a district court's sentencing order concerning an habitual offender. **WRIT SUSTAINED, SENTENCE VACATED, REMANDED FOR RESENTENCING.**

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, Judson L. Frisk, County Attorney, and Susan Larson-Christensen, Assistant County Attorney, for appellant.

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender for appellee.

Joel Niebaum, Missouri Valley, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

VAITHESWARAN, J.

The State petitioned for a writ of certiorari, seeking resolution of a single issue: whether the district court erred in sentencing Thomas Donelson to an indeterminate five-year prison sentence on a conviction for operating while intoxicated (third offense) as an habitual offender.

Iowa Code section 902.9(5) (2005), by its terms, precludes imposition of this prison term for habitual offenders. Iowa Code § 902.9(5) (“A class ‘D’ felon, *not an habitual offender*, shall be confined for no more than five years”) (emphasis added). The sentence for habitual offenders is governed by Iowa Code section 902.9(3), which states, “[a]n habitual offender shall be confined for no more than fifteen years.” *Cf. State v. Allen*, 601 N.W.2d 689, 690 (Iowa 1999) (stating defendant did not dispute that original five-year sentence for third-offense OWI as an habitual offender “was not authorized by statute”). Contrary to Donelson’s assertion, the district court had no discretion to impose a lesser indeterminate term. *See State v. Dohrn*, 300 N.W.2d 162, 164 (Iowa 1981).

WRIT SUSTAINED, SENTENCE VACATED, REMANDED FOR RESENTENCING.