IN THE COURT OF APPEALS OF IOWA

No. 2-296 / 11-1049
Filed May 23, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

HENDRICKSON L. SCHAUF,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Ian K. Thornhill, Judge.

A defendant appeals from the judgment entered following his guilty pleas to sexual abuse in the third degree and lascivious acts with a child. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Jason A. Burns, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

TABOR, J.

After accepting his guilty pleas to sexual abuse in the third degree and lascivious acts with a child, the district court sentenced Hendrickson Leweston Schauf to consecutive sentences not to exceed fifteen years and ordered him to pay fines totaling $1750. Schauf challenges only the fines in this appeal.

Schauf argues the district court abused its discretion by imposing the fines based on a mistaken belief, expressed during the plea hearing, that the fines were mandatory. Schauf's argument is based on *State v. Ayers*, 590 N.W.2d 25, 32-33 (Iowa 1999), which interpreted the 1997 version of Iowa Code section 902.9. Because the legislature has since amended section 902.9, *Ayers* does not require reversal of the sentencing court's imposition of the fines.

I. Background Facts and Proceedings.

The State charged Schauf with second-degree sexual abuse, third-degree sexual abuse, and lascivious acts with a child. Schauf entered guilty pleas to third-degree sexual abuse and lascivious acts with a child.

At the May 31, 2011 plea hearing, the following exchange occurred:

> THE COURT: All right. Count Two is a Class C felony, which is punishable by up to ten years in prison and a maximum of a $10,000.00 fine.
>
> There is a mandatory minimum $1000.00 fine, but there is no minimum required jail time.
>
> Do you understand the punishments for Count Two?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: Count Three is a Class D felony, which is punishable by up to five years in prison, and up to a 700—or, excuse me—a $7500.00 fine with a minimum fine of $750.00, but no minimum requirement for jail.
>
> Do you understand that?
>
> THE DEFENDANT: Yes, your Honor.

On June 14, 2011, the court sentenced Schauf to ten years' imprisonment and a $1000 fine on the sexual abuse conviction, and five years' imprisonment and a $750 fine on the lascivious acts conviction. Schauf filed his notice of appeal on June 30, 2011.

II. Scope and Standard of Review.

We review a criminal sentence for the correction of errors at law. *State v. Kramer*, 773 N.W.2d 897, 899 (Iowa Ct. App. 2009). We will not disturb a sentence on appeal unless the defendant shows an abuse of discretion or a defect in the sentencing procedure. *Id.* If a court fails to exercise its discretion in determining what sentence to impose when a sentence is not mandatory, we must vacate the sentence and remand for resentencing. *Id.*

III. Analysis.

Schauf contends the district court failed to exercise its discretion in ordering him to pay a $1000 fine on the sexual abuse conviction and a $750 fine on the lascivious acts conviction.

The district court spoke of the mandatory minimum fines at the plea hearing, not at sentencing. At sentencing, the court did not refer to a mandatory minimum sentence. Instead, it ordered Shauf's terms of imprisonment to be served consecutively. It cited as reasons: "the nature and circumstances of the offenses, the characteristics of the Defendant, including, but not limited to, the information in the presentence report, including his criminal history." The record shows the court properly exercised its discretion in sentencing Schauf.

Even if the sentencing court believed it had no discretion in fining Schauf, we find no error. In arguing the fines are not mandatory, Schauf relies on *Ayers*, 590 N.W.2d at 32-33 and *State v. Peterson*, 327 N.W.2d 735, 738 (Iowa 1982), which hold that a sentencing court may, but need not, impose a fine for class "C" or "D" felonies. At the time of those rulings, Iowa Code section 902.9 provided that class "C" and "D" felons "shall be confined" for a certain period "and in addition *may* be sentenced to a fine of at least" a certain amount. *Ayers*, 590 N.W.2d at 32 (emphasis added). Our supreme court decided that language indicated the court had the power to impose the fine, but that "the sentencing court need not impose a fine." *Id.*

Just four months after the supreme court's ruling in *Ayers*, the legislature amended section 902.9 to state in pertinent part:

> 4. A class "C" felon, not an habitual offender, shall be confined for no more than ten years, and in addition shall be sentenced to a fine of at least one thousand dollars but not more than ten thousand dollars.
> 5. A class "D" felon, not an habitual offender, shall be confined for no more than five years, and in addition shall be sentenced to a fine of at least seven hundred fifty dollars but not more than seven thousand five hundred dollars.

See 1999 Iowa Acts 78, ch. 65, §§ 6, 7. The replacement of "may" with "shall" indicates the imposition of a fine is no longer merely permissible, but required. *See State v. Klawonn*, 609 N.W.2d 515, 522 (Iowa 2000) ("Sometimes courts are justified in interpreting the word 'shall' as 'may,' but, when used in a statute directing that a public body do certain acts, it is manifest that the word is to be construed as mandatory and not permissive. The uniform rule seems to be that the word 'shall,' when addressed to public officials, is mandatory and excludes

the idea of discretion."). While the sentencing court arguably retained the power to suspend those fines, "[s]uspending a fine and imposing no fine are not equivalent." *See State v. Grey*, 514 N.W.2d 78, 79 (Iowa 1994). Because the district court did not abuse its discretion in imposing the fines in this case, we find no cause for resentencing.

AFFIRMED.