

IN THE COURT OF APPEALS OF IOWA

No. 3-289 / 12-0415
Filed May 30, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PERRY BERNARDO BENDER,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke, Judge (sentencing order), and Angela L. Doyle, District Associate Judge (nunc pro tunc order).

Defendant appeals his sentence on a conviction for willful injury.

AFFIRMED IN PART, REVERSED IN PART, AND ORDER NUNC PRO TUNC VACATED.

Kevin Hobbs, West Des Moines, for appellant.

Perry B. Bender, Rockwell City, appellant pro se.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, and Ricki N. Osborn, County Attorney, for appellee.

Considered by Doyle, P.J., Mullins, J., and Sackett, S.J.*

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

SACKETT, S.J.

Defendant-appellant Perry Bender appeals contending that his plea on May 3, 2001 to willful injury, in violation of Iowa Code section 708.4(2) (2001), a Class “D” felony, should be voided because he was given an illegal sentence and the court improperly corrected the sentence in an order nunc pro tunc. He contends the nunc pro tunc order should be voided and he should be returned for resentencing. The State agrees that the initial sentence imposed was illegal and that an order nunc pro tunc was not the proper mechanism for correcting it. Bender, in a pro se brief, also contends that unless he and the State come to agreement at a sentencing hearing the court should vacate his plea. The State contends, however, that the issue should be found to be moot as Bender’s sentence has been discharged and the issue now raised is not “of broad public importance likely to recur.” The State further contends that there is no need to remand for resentencing because the sentence was a product of a plea agreement, not an exercise of the district court’s discretion, and consequently the error is harmless. We vacate the nunc pro tunc order and remand for resentencing.

SCOPE OF REVIEW. Our review of a sentence imposed in a criminal case is for correction of errors at law. Iowa R. App. P. 6.907; *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002); *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998). We will not reverse the decision of the district court absent an abuse of discretion or some defect in the sentencing procedure. *Witham*, 583 N.W.2d at 678.

BACKGROUND AND PROCEEDURE. The facts are not in dispute. On May 2, 2001, Bender entered an *Alford* plea of guilty to Iowa Code section 708.4(2), a class “D” felony. The court committed Bender to the custody of the Director of the Iowa Department of Corrections for a term not to exceed five years, suspended Bender’s sentence and placed him on probation for two years. No fine was imposed. Bender’s probation was revoked in June of 2002 and an additional term of probation was ordered. On March 8, 2004, an order was entered relieving the Department of Correctional Services of supervision of Bender, but his probation was to continue until it expired as previously ordered, although it was transferred to the county sheriff on an informal, unsupervised basis.

On November 9, 2011, Bender filed a motion to correct illegal sentence. He contends a condition of his *Alford* plea was an understanding that no fine would be imposed and the sentencing order so stated. He argues the sentence was illegal because Iowa Code section 902.9(5) says:

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.

A district associate judge responded to Bender’s motion and entered an “Order Nunc Pro Tunc” that said defendant’s motion to correct an illegal sentence came before the court and the court found the May 2, 2001 order did not impose a fine and should be amended. The court then ordered that paragraph 3 of the order that provided there be no fine imposed against defendant be deleted and inserted in the following language:

3. Defendant shall pay a fine of \$750 and a surcharge of 30%. All said fine and surcharge shall be suspended.

On December 2, 2011, Bender filed a motion asking the court to reconsider its nunc pro tunc order. He contended that a nunc pro tunc order cannot be used to correct legal error in a judgment entry, that the order is in violation of the plea agreement that no fine would be imposed, and the entry of the order was in violation of Bender's right to be present during sentencing and his right to be heard among other things. He asked for an order vacating his judgment of conviction and sentence. The court denied his motion for reconsideration. He made another motion for reconsideration which was denied, as was his motion for appointment of counsel. This appeal followed.

While conceding that the sentence was illegal and a nunc pro tunc order was not the proper way to correct it, the State contends that we should find that Bender did not appeal from the judgment entered on his conviction within the required time, and the conviction is not before the court, so consequently the controversy is moot. The State advances that Bender was discharged from his sentence on March 8, 2004, and the time for appeal of the conviction has long passed.

The State further argues the matter is not of broad public importance likely to recur. The State advances that defendant's case came shortly after the Iowa legislature amended Iowa Code section 902.9(5) to provide a fine for a class "D" felony conviction, and that the amended provision has now been in place for some thirteen years. The State additionally asserts the error is not likely recur and if it does defendants will have an opportunity to raise the issue in the district

court or on appeal. The State further contends the issue of a nunc pro tunc order to correct a sentence is not likely to reoccur. The order was not to correct a clerical oversight; the decision not to impose a fine was the product of judicial reasoning. The State also indicates that the order satisfied the statute and its suspension of the fine was in accord to the original sentencing court's intention not to place a financial obligation on defendant.

MOOTNESS. Ordinarily, an appeal is deemed moot if the issue becomes nonexistent or academic and, consequently, no longer involves a justiciable controversy. *In re M.T.*, 625 N.W.2d 702, 704 (Iowa 2001). We generally refrain from reviewing moot issues. *Polk County Sheriff v. Iowa Dist. Ct.*, 594 N.W.2d 421, 425 (Iowa 1999); *Shannon v. Hansen*, 469 N.W.2d 412, 414 (Iowa 1991). However, an exception exists for issues of broad public importance likely to recur. *M.T.*, 625 N.W.2d at 704; *T & K Roofing Co., Inc. v. Iowa Dep't of Educ.*, 593 N.W.2d 159, 162 (Iowa 1999).

In determining whether we should review a moot action, we consider four factors. These factors include: (1) the private or public nature of the issue, (2) the desirability of an authoritative adjudication to guide public officials in their future conduct, (3) the likelihood of the recurrence of the issue, and (4) the likelihood the issue will recur yet evade appellate review. *Polk County Sheriff*, 594 N.W.2d at 425; see *Shannon*, 469 N.W.2d at 414. The last factor is perhaps the most important factor. See *M.T.*, 625 N.W.2d at 704-05. If a matter will likely be moot before reaching an appellate court, the issue will never be addressed. Thus, the high likelihood of the issue recurring necessarily implies the desirability

of an authoritative adjudication on the subject. *State v. Hill*, 334 N.W.2d 746, 747 (Iowa 1983).

In *State v. Hernandez-Lopez*, 639 N.W.2d 226, 235 (Iowa 2002), the court agreed with the State, in part, that an appeal should be dismissed on mootness grounds where the defendants had been released from custody and were no longer within the jurisdiction of this state, noting a decision on their as-applied constitutional challenges would have no practical legal effect in the underlying controversy. The court cited *M.T.*, 625 N.W.2d at 704, for the proposition that courts dismiss appeals when a judgment would have “no practical legal effect upon the existing controversy.” *Hernandez-Lopez*, 639 N.W.2d at 235; see also *T & K Roofing Co.*, 593 N.W.2d at 162-63. The court, however, found the defendants' facial due process challenges were issues of public importance that Iowa appellate courts have not yet interpreted and a decision would provide guidance to law enforcement personnel and judicial officers faced with similar situations in the future. *Hernandez-Lopez*, 639 N.W.2d at 235, (citing *Polk County Sheriff*, 594 N.W.2d at 425; *Shannon*, 469 N.W.2d at 414). The court concluded the appeal fell within the exception to the mootness doctrine. *Id.*

However, an illegal sentence is one that is not permitted by statute. *State v. Hess*, 533 N.W.2d 525, 527 (Iowa 1995). “An illegal sentence is void and ‘not subject to the usual concepts of waiver, whether from a failure to seek review or other omissions of error preservation.’” *State v. Woody*, 613 N.W.2d 215, 217 (Iowa 2000) (quoting *State v. Ohnmacht*, 342 N.W.2d 838, 842-43 (Iowa 1983)). Because an illegal sentence is void, it can be corrected at any time. See Iowa R.

Crim. P. 23(5)(a) (“The court may correct an illegal sentence at any time.”). Thus, when “the claim is that the sentence itself is inherently illegal, whether based on constitution or statute,” the claim may be asserted at any time. *State v. Bruegger*, 773 N.W.2d 862, 872 (Iowa 2009).

The breadth of this rule was recently illustrated in *Veal v. State*, 779 N.W.2d 63, 65 (Iowa 2010), where the court held that even expiration of the statute of limitations for postconviction-relief actions will not bar a challenge to an illegal sentence. Based on this holding, we therefore vacate the nunc pro tunc order and the initial sentencing order and remand for resentencing. We also reject Bender’s pro se argument that due to a violation of Iowa Code section 708.4(2) his conviction should be vacated. We agree with the State’s argument that the time for appeal of that conviction has passed and affirm the conviction.

AFFIRMED IN PART, REVERSED IN PART, AND ORDER NUNC PRO TUNC VACATED.