

IN THE COURT OF APPEALS OF IOWA

No. 9-159 / 08-1077
Filed March 26, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL DAVID PAPESH,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Kellyann M. Lekar, Judge.

Michael David Papesh appeals following conviction and sentence for possession of more than five grams of methamphetamine with intent to deliver, possession of ephedrine with intent to manufacture, possession of lithium with intent to manufacture, possession of anhydrous ammonia with intent to manufacture, and failure to possess a tax stamp. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad Walz and James Katcher, Assistant County Attorneys, for appellee.

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

MAHAN, P.J.

Michael David Papesh appeals following conviction and sentence for possession of more than five grams of methamphetamine with intent to deliver in violation of Iowa Code section 124.401(1)(b) (2005), possession of ephedrine with intent to manufacture in violation of section 124.401(4), possession of lithium with intent to manufacture in violation of section 124.401(4), possession of anhydrous ammonia with intent to manufacture in violation of section 124.401(4), and failure to possess a tax stamp in violation of section 453B.12. He contends the district court erred in ruling that section 901.10 did not authorize up to a one-third reduction to the one-third mandatory minimum on his sentence. We affirm.

I. Background Facts and Proceedings.

On July 31, 2006, Papesh was charged with possession of more than five grams of methamphetamine with intent to deliver, possession of ephedrine with intent to manufacture, possession of lithium with intent to manufacture, possession of anhydrous ammonia with intent to manufacture, and failure to possess a tax stamp. Papesh filed a motion to suppress, which the district court granted. Thereafter, the State filed an application for discretionary review, which the court granted.

Meanwhile, while that matter was on appeal, Papesh was again charged and convicted of possession of more than five grams of methamphetamine with intent to deliver, for an offense that took place on April 6, 2007. Judgment was filed on June 16, 2007, and Papesh was sentenced to twenty-five years with a mandatory one-third minimum. The district court reduced the mandatory

minimum by one-third under Iowa Code section 901.10(1) and 901.10(2) as a result of Papesh's guilty plea.

On January 30, 2008, the present case (involving Papesh's 2006 offenses) was reversed and remanded. Papesh entered a plea of guilty to the charges and was sentenced on June 6, 2008. For the possession of more than five grams of methamphetamine with intent to deliver offense, Papesh was sentenced to an indeterminate term of twenty-five years, with a mandatory one-third minimum. He was sentenced to five years each for the remaining four counts. All counts were to be run concurrently with each other, but consecutively with his sentence for the 2007 offense. Papesh now appeals.

II. Scope and Standard of Review.

We review the district court's interpretation of a statute for corrections of errors at law. Iowa R. App. P. 6.4; *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008).

III. Merits.

Papesh argues the district court erred in ruling Iowa Code section 901.10 did not authorize a one-third reduction to the one-third mandatory minimum on his sentence. He contends the court should have reduced the one-third mandatory minimum by one-third on his offense of possession of more than five grams of methamphetamine with intent to deliver in this case. Specifically, he claims that the court erred in concluding his 2008 conviction for the 2006 offenses was not a first conviction, but rather, it was a second conviction subsequent to the 2007 offense and conviction that occurred while this case was on appeal. Section 901.10 provides:

1. A court sentencing a person *for the person's first conviction* under section . . . 124.413 . . . may, at its discretion, sentence the person to a term less than provided by the statute if mitigating circumstances exist and those circumstances are specifically stated on the record.

2. Notwithstanding subsection 1, if the sentence under section 124.413 involves an amphetamine or methamphetamine offense under section 124.401, subsection 1, paragraph "a" or "b", the court shall not grant any reduction of sentence unless the defendant pleads guilty. If the defendant pleads guilty, the court may, at its discretion, reduce the mandatory minimum sentence by up to one-third.

Papesh was convicted under section 124.401(b). Section 124.413 requires defendants convicted under section 124.401 to serve a one-third mandatory minimum of the maximum indeterminate sentence for the conviction under that section. Papesh was sentenced to twenty-five years with a mandatory one-third minimum. The court, however, did not exercise its discretion to reduce the mandatory minimum by one-third, because at the 2008 sentencing for the offenses that occurred in 2006 Papesh had already been sentenced for the offenses that took place in 2007. We note that with regard to the 2007 offenses, the court *did* exercise its discretion to reduce the mandatory minimum by one-third.¹

The crux of Papesh's argument relies on a comparison of sections 901.10 and 902.8. Section 902.8 is Iowa's habitual offender statute, which is designed to "punish violators who have not responded to the restraining influence of conviction and punishment." *State v. Woody*, 613 N.W.2d 215, 218 (Iowa 2000).

¹ Papesh is essentially arguing that he should receive reductions on two separate convictions under section 901.10, which only applies to "the person's *first* conviction." Iowa Code § 901.10(1) (emphasis added).

Papesh claims the reduction provisions of section 901.10 should be applied in the same manner as section 902.8. We disagree.

The language of section 901.10 is clear. The court may use the statute at its discretion if, on a defendant's first conviction, "mitigating circumstances exist" warranting a reduction in punishment. Section 901.10 is not a recidivist statute. Because the statute only applies to defendants on their first conviction, it is obvious it is not designed to deter and punish offenders who have not responded to prior judicial sanctions, as is section 902.8.

In this case, we find that due to the timing of Papesh's appeal on his 2006 offenses, the district court was correct in considering Papesh's 2007 offense and conviction to be his first methamphetamine conviction under section 124.401. We further find that, upon finding evidence of mitigating circumstances, the district court was correct in exercising its discretion under section 901.10 to reduce Papesh's sentence for the 2007 offense and conviction. Therefore, when Papesh was sentenced for the 2006 offenses in 2008, it was no longer his first methamphetamine conviction under section 124.401, and the reduction provisions under that section no longer applied. Finding no error, we affirm.

AFFIRMED.