

IN THE COURT OF APPEALS OF IOWA

No. 9-218 / 08-0497
Filed April 22, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

YANCEY ALLEN RUSSELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchinson,
Judge.

Russell appeals from the judgment and sentence following his convictions
of possession of a simulated controlled substance and delivery of a simulated
controlled substance. **REMANDED WITH DIRECTIONS.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney
General, John P. Sarcone, County Attorney, and Steve Bayens, Assistant County
Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

EISENHAUER, J.

Yancy Allen Russell was convicted of possession of a simulated controlled substance and delivery of a simulated controlled substance for acts occurring in the same transaction. The district court sentenced him to serve indeterminate terms of imprisonment not to exceed ten years on each count, then ordered the sentences to merge. Russell appeals, contending the court erred in failing to merge the two convictions. Although the trial court was not asked to merge the convictions, an illegal sentence is not subject to the usual requirements of error preservation and waiver. *State v. Halliburton*, 539 N.W.2d 339, 342 (Iowa 1995). We review challenges to the legality of a district court's merger decision for correction of errors at law. See *State v. Anderson*, 565 N.W.2d 340, 342 (Iowa 1997).

Iowa Code section 701.9 (2007) states:

No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

Although the court merged the sentences for Russell's convictions, Russell argues the court should have gone further and entered judgment against him on only one conviction, not both. The State responds by arguing the merger of two convictions actually means the merger of the judgments of conviction, i.e., the sentences.

We conclude the district court erred in failing to merge the two convictions.

In the restricted or technical legal sense in which it is sometimes used, the word 'conviction' includes *the status of being guilty of*,

and sentenced for, a criminal offense, whether that status is established after confession of guilt by a guilty plea or after determination by a jury verdict upon an assertion of innocence.

State v. Hanna, 179 N.W.2d 503, 507-08 (Iowa 1970) (emphasis added). The two legal convictions must be merged into the greater offense, and sentence given only on this offense. Accordingly, we remand for an order merging defendant's convictions, and resentencing him.

REMANDED WITH DIRECTIONS.