

IN THE COURT OF APPEALS OF IOWA

No. 9-485 / 08-1611
Filed July 22, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ERIC WAYNE DEMPSEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Charles H. Pelton,
Judge.

A defendant appeals his conviction and sentence, claiming that counsel was ineffective for failing to challenge his guilty plea as not being knowing and voluntary. **SENTENCE VACATED, CASE REMANDED FOR RESENTENCING.**

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

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Michael J. Walton, County Attorney, and Joseph Grubisich and Julie Walton, Assistant County Attorneys, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

VAITHESWARAN, P.J.

Eric Dempsey pleaded guilty to assault with intent to commit sexual abuse (an aggravated misdemeanor) and second-degree burglary. The district court sentenced Dempsey to prison, enhancing his sentence based on a prior conviction. The court also imposed a special sentence of ten years parole pursuant to Iowa Code section 903B.2 (2007).

On appeal, Dempsey claims he did not admit to the prior conviction that enhanced his sentence and he was not informed that his prison term for the assault crime was mandatory. He asserts trial counsel was ineffective in failing to challenge his plea on these grounds. Dempsey also asserts that the district court acted illegally in imposing the special sentence.

I. Ineffective Assistance of Counsel Claims***A. Prior Conviction***

Iowa Code section 901A.2 provides for “enhanced sentencing” for sexually predatory offenses. It states, in pertinent part,

A person convicted of a sexually predatory offense which is a serious or aggravated misdemeanor, who has a prior conviction for a sexually predatory offense, shall be sentenced to and shall serve twice the maximum period of incarceration for the offense

.....

Iowa Code § 901A.2 (1).

Dempsey’s conviction for assault with intent to commit sexual abuse was a sexually predatory offense and was an aggravated misdemeanor. See Iowa Code §§ 709.11, 901A.1(1)(a). The question is whether Dempsey admitted to a prior conviction for a sexually predatory offense. Dempsey argues that he did not, rendering his guilty plea legally inadequate. The State concedes that the

district court did not “directly ask him to admit the prior conviction,” but argues that the record nonetheless discloses a factual basis for the prior conviction.

We agree with the State. The presentence investigation report disclosed a prior conviction for third-degree sexual abuse, a crime which meets the definition of a sexually predatory offense. See Iowa Code §§ 709.4, 901A.1(1)(a). Additionally, the district court deferred acceptance or rejection of Dempsey’s plea until that report was received. Because the record disclosed the prior conviction, Dempsey’s failure to admit to the earlier crime did not deprive the plea of a factual basis. See *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001) (stating the trial court is not permitted to accept a guilty plea without first establishing that a factual basis exists for such a plea). For the same reason, defense counsel was not ineffective in failing to challenge the plea on the ground that Dempsey did not admit to the prior conviction. *Id.* (stating that if a defendant enters a guilty plea without a factual basis in the record, defense counsel has provided ineffective assistance and prejudice is inherent).

Dempsey also suggests that the district court did not question him about whether he understood the consequences of the prior conviction. See *State v. Kukowski*, 704 N.W.2d 687, 692 (Iowa 2005) (noting duty to “ensure the affirmation is voluntary and intelligent”); *State v. McBride*, 625 N.W.2d 372, 375 (Iowa Ct. App. 2001) (“In order to knowingly stipulate, a defendant should have an adequate grasp of the implications of his or her stipulation.”). He maintains defense counsel was ineffective in failing to challenge this omission.

The district court in fact disclosed the consequences of a prior conviction. The court informed Dempsey that he “would be sentenced to serve twice the maximum period of incarceration.” The court went on to say,

There is also the caveat that the sentence—you must serve 85 percent before being eligible for parole or work release. This would be on the count—on the sexual—Assault With Intent to Commit Sexual Abuse. That’s subject to an 85 percent—you are—they are alleging that you have a previous conviction.

The court then explained the section 901A.2 enhancement, stating:

[T]he Code Section reads that a person convicted of a sexually predatory offense which is a serious or aggravated misdemeanor—and that’s what they are alleging, you committed an aggravated misdemeanor—who has a prior conviction for a sexually predatory offense shall be and—shall serve twice the maximum period of incarceration for the offense. So in this case they are alleging an aggravated misdemeanor, which is normally two years, so twice that would be up to four years, and then it says notwithstanding any other provision of the Code to the contrary. Prior to being eligible for work release, however, a person sentenced under the subsection shall not have the prison sentence reduced under Chapter 903A—and that’s the good time and work release—for more than 15 percent. So on—so that means you are looking at a four-year, and on that four-year sentence you would have to serve—regardless of how good you are in prison on that four-year sentence you would have to serve 85 percent of that one.

When Dempsey indicated he was unaware of these consequences, the district court gave him time to consult with his attorney and gave him the option of delaying the proceedings. After conferring with counsel, Dempsey stated he was ready to proceed and he fully understood the enhancement.

We conclude the district court adequately explained the ramifications of the prior conviction and counsel was not ineffective in failing to challenge the plea on this basis.

B. Mandatory Minimum Sentence

Dempsey contends he was not advised that the enhanced sentence described above was mandatory. See Iowa R. Crim. P. 2.8(2)(b)(2) (mandating that before a plea is accepted, the court must determine that the defendant understands the mandatory minimum punishment for the crime). He asserts counsel was ineffective in failing to challenge this claimed omission. See *State v. Kress*, 636 N.W.2d 12, 22 (Iowa 2001) (stating counsel ineffective for failing to correct a district court's misstatement as to the mandatory minimum sentence and for failing to file a motion in arrest of judgment raising the issue).

Iowa Code section 901A.2(7) states that a person is not eligible for a deferred judgment, deferred sentence, or suspended sentence if sentenced under section 901A.2. The district court told Dempsey that after serving the ten-year burglary sentence, "You could have to start serving the four-year [sentence], and the worst case scenario is you would serve four of that. The best case scenario is you serve 85 percent of it." While this statement does not precisely explain the mandatory nature of the sentence, we reiterate that Dempsey was given more time to discuss his possible sentence with his attorney and, after the discussion, both Dempsey and his attorney stated that any confusion had been cleared up and Dempsey now fully understood the possible sentence. On this record, we conclude rule 2.8(2)(b) was not violated and counsel was not ineffective in failing to challenge the colloquy.

II. Illegal Sentence

Dempsey next contends that the district court acted illegally in imposing the special sentence under section 903B.2. That section provided:

A person convicted of a misdemeanor or a class “D” felony offense under chapter 709, section 726.2, or section 728.12 shall also be sentenced, in addition to any other punishment provided by law, to a special sentence committing the person into the custody of the director of the Iowa department of corrections for a period of ten years, with eligibility for parole as provided in chapter 906. The special sentence imposed under this section shall commence upon completion of the sentence imposed under any applicable criminal sentencing provisions for the underlying criminal offense and the person shall begin the sentence under supervision as if on parole.

Iowa Code § 903B.2.¹ Under this provision, Dempsey was committed to the custody of the department of corrections for ten years after the completion of his sentence. Dempsey argues that this ten-year “parole” period conflicts with the following two-year parole period set forth in section 901A.2(8):

In addition to any other sentence imposed on a person convicted of a sexually predatory offense pursuant to subsection 1, 2, or 3, the

¹ This provision was amended in 2009, as follows:

A person convicted of a misdemeanor or a class “D” felony offense under chapter 709, section 726.2, or section 728.12 shall also be sentenced, in addition to any other punishment provided by law, to a special sentence committing the person into the custody of the director of the Iowa department of corrections for a period of ten years, with eligibility for parole as provided in chapter 906. The board of parole shall determine whether the person should be released on parole or placed in a work release program. The special sentence imposed under this section shall commence upon completion of the sentence imposed under any applicable criminal sentencing provisions for the underlying criminal offense and the person shall begin the sentence under supervision as if on parole or work release. The person shall be placed on the corrections continuum in chapter 901B, and the terms and conditions of the special sentence, including violations, shall be subject to the same set of procedures set out in chapters 901B, 905, 906, and 908, and rules adopted under those chapters for persons on parole or work release. The revocation of release shall not be for a period greater than two years upon any first revocation, and five years upon any second or subsequent revocation. A special sentence shall be considered a category “A” sentence for purposes of calculating earned time under section 903A.2.

Iowa Code § 903B.2 (2009). The amendment does not affect the issue on appeal.

person shall be sentenced to an additional term of parole or work release not to exceed two years.

The State responds that the two provisions are capable of being harmonized. In its view,

[T]he ten-year special sentence of parole under section 903B.2 would not commence until the completion of the two-year term of parole or work release under section 901A.2(8), which constitutes “the sentence imposed under any applicable criminal sentencing provisions for the underlying criminal offense.” In other words, when a person’s offense qualifies for both parole provisions, he must first serve up to two years of parole or work release under section 901A.2(8); when he is discharged from that parole or work release, the special sentence in section 903B.2 kicks in and the person must serve an additional ten years of parole.

We concur with the State’s reading of the two provisions. Section 903B.2 plainly is an additional sentencing provision that is tacked on to section 901A.2(8), rather than an alternate, more general, sentencing provision. *But see State v. Wade*, 757 N.W.2d 618, 629 (Iowa 2008) (finding section 903B.2 more specific than section 903.1(1)(b), the sentencing provision for misdemeanors not specifying penalty).

As the district court did not sentence Dempsey under section 901A.2(8), the State asks us to vacate the sentence and remand for “imposition of two years of parole or work release to be completed before the start of the ten-year special sentence of parole already imposed.”

An “illegal sentence is a nullity subject to correction, even though correction may result in an increase in the sentence on remand.” *State v. Draper*, 457 N.W.2d 600, 606 (Iowa 1990). Because section 901A.2(8) also applies to Dempsey, we grant the State’s request.

SENTENCE VACATED, CASE REMANDED FOR RESENTENCING.