

IN THE COURT OF APPEALS OF IOWA

No. 0-041 / 09-1161
Filed March 10, 2010

JASON MATTHEW NIELSEN,
Plaintiff,

vs.

IOWA DISTRICT COURT FOR POLK COUNTY,
Defendant.

Appeal from the Iowa District Court for Polk County, James D. Birkenholz and Colin J. Witt, District Associate Judges.

Jason Nielsen seeks certiorari review of a district court order setting aside his sentence and ordering resentencing. **WRIT SUSTAINED.**

Dean Stowers of Stowers Law Firm, West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and Thomas DeSio and David Porter, Assistant County Attorneys, for appellee.

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

POTTERFIELD, J.**I. Background Facts and Proceedings**

Jason Nielsen submitted a petition to plead guilty to operating while intoxicated second offense in violation of Iowa Code section 321J.2 (2009), dated July 23, 2009. The plea form does not indicate whether there was a plea agreement. Nielsen requested immediate sentencing and waived his rights to a reported hearing, to allocution, to file a motion in arrest of judgment, to challenge the plea on direct appeal, and to have a presentence investigation. On the morning of July 27, 2009, the Honorable James Birkenholz entered an order accepting the plea and sentencing Nielsen to one year in jail with all but fourteen days suspended. The court ordered mittimus to issue immediately. The court's order did not include a provision requiring Nielsen to report to the jail sober. The sentencing order did not exonerate bond, but no financial bond had been set pre-trial. The record before us does not reflect whether or when Nielsen appeared personally before Judge Birkenholz. We are not provided a further record of the plea or sentencing proceedings before Judge Birkenholz, nor of any communication between counsel and Judge Birkenholz related to plea agreements.¹

Nielsen reported to the Polk County Jail as ordered on July 27, 2009. There, his blood alcohol concentration was tested, with a test result of .146. The same day, the district court issued an order setting aside its sentence "due to the

¹ The record includes a plea offer prepared with the trial information in which the State agreed to recommend certain sentencing terms if Nielsen would plead guilty to operating while intoxicated second offense. However, the terms of this plea offer are different than the terms of the plea agreement on which Nielsen relies on appeal. The plea agreement on which Nielsen relies is not in the record.

fact [Nielsen] was intoxicated at the time of sentencing.” Judge Birkenholz revoked bond and ordered Nielsen to be held in jail until resentencing, which was scheduled for August 6, 2009. On July 27, 2009, Nielsen filed an objection to the postjudgment order, alleging it was based on ex parte communications and requesting that the order setting aside his sentencing be vacated.

On August 4, 2009, the Honorable Colin Witt sentenced Nielsen to two years in jail with all but twenty-eight days suspended, with credit for nine days served. Judge Witt did not conduct an independent review of the need for resentencing. Instead, he took the position that he had “information from Judge Birkenholz that indeed [Nielsen] was intoxicated,” and that based on Judge Birkenholz’s prior order a resentencing was required. On August 5, 2009, Nielsen filed a notice of appeal and motion for emergency relief. The same day, the Iowa Supreme Court temporarily suspended Nielsen’s jail sentence until further order. The supreme court treated Nielsen’s notice of appeal and motion for emergency relief as a petition for writ of certiorari, granted the request, and transferred the case to our court.

Nielsen now argues the district court violated due process, the Iowa Code, and the Iowa Rules of Criminal Procedure by setting aside the sentence and judgment without notice or opportunity to be heard after accepting a binding plea. Nielsen further asserts the district court had no factual basis on which to set aside the judgment and sentence, and the resentencing proceeding did not cure the errors.

II. Standard of Review

We review the district court's ruling for correction of errors at law. *State Pub. Defender v. Iowa Dist. Ct. for Clarke County*, 745 N.W.2d 738, 739 (Iowa 2008). Relief through certiorari is appropriate if the district court has exceeded its jurisdiction or acted illegally. *Id.* A district court acts illegally when its findings lack substantial evidentiary support or when it does not properly apply the law. *Id.* The district court's factual findings are binding if well supported, but its legal conclusions are not. *Id.*

III. Plea

Nielsen argues that Judge Birkenholz's July 27 order accepting plea and sentencing constituted the acceptance of a plea agreement conditioned on court approval, pursuant to Iowa Rule of Criminal Procedure 2.10(3). Rule 2.10(2) provides that if a plea agreement has been reached by the parties, it shall be disclosed in open court. Rule 2.10(3) provides that when a plea agreement is conditioned on the court's concurrence and the court accepts the plea agreement, it shall inform the defendant that it will impose the sentence provided for in the plea agreement or make another disposition more favorable to the defendant. Thus, Nielsen argues the district court did not have authority to impose a greater sentence than provided in the plea agreement.

Nielsen's written plea form does not mention a plea agreement of any kind. Nielsen waived the reporting of his plea and sentence proceedings and did not prepare a statement of unreported proceedings pursuant to Iowa Rule of Appellate Procedure 6.10(3) to complete a record for purposes of his appeal. We are provided no record to indicate that Nielsen's plea was conditioned on

Judge Birkenholz's approval of a sentencing recommendation. Without such information in the record, we cannot find that Judge Birkenholz imposed an agreed upon sentence pursuant to a conditional plea agreement.

IV. Notice

Nielsen argues the district court's decision to vacate its sentence without notice to him or opportunity to be heard violated due process and Iowa Code section 903.2. Section 903.2 provides,

For a period of thirty days from the date when a person convicted of a misdemeanor begins to serve a sentence of confinement, the court may order the person to be returned to the court, at which time the court may review its previous action and reaffirm it or substitute for it any sentence permitted by law.

The court has the authority under Iowa Code section 903.2 to reconsider a defendant's sentence sua sponte. In *Hewitt v. Iowa Dist. Court for Wapello County*, 538 N.W.2d 291, 292 (Iowa 1995), after pronouncing sentence, the district court judge conferred with the two attorneys in the matter regarding additional sentencing options. Hewitt was not present during this conference. *Hewitt*, 538 N.W.2d at 292. Two days later, the district court entered a written judgment entry setting forth a sentence with an additional condition that had not been included in the oral sentence pronounced at the sentencing hearing. *Id.* Hewitt objected to the imposition of the additional condition. *Id.* On its own motion, the court scheduled a hearing to reconsider its oral sentence. *Id.* After a hearing at which Hewitt was present, the court reconsidered its oral sentence and modified it by inserting the additional condition. *Id.* Hewitt appealed, arguing the court erred in filing a judgment entry that differed from its oral sentence. *Id.*

The supreme court in *Hewitt* found that the court had the power under section 903.2 to reconsider its sentence at the later hearing scheduled for that purpose. *Id.* The court stated, “Therefore, error, if any, by the trial court in issuing a written judgment entry different from its oral pronouncement was cured by the court’s later reconsideration of the oral sentence pursuant to section 903.2.” *Id.* The court found that because Hewitt was personally present when the court reconsidered his sentence, the court complied with section 903.2 and acted within its authority. *Id.* at 293.

Thus, we conclude the district court had authority to reconsider and modify Nielsen’s sentence on August 4, 2009, which was within 30 days of the commencement of the original sentence. Further, Nielsen argues, the State concedes, and we agree, that there were procedural irregularities in the resentencing. Nielsen should not have been subjected to a more onerous sentence based on unproved *ex parte* allegations. Also, because Nielsen was a bailable defendant pursuant to Iowa Code section 811.1, the district court should not have held him without bond pending resentencing. We therefore vacate the resentence, reinstate Nielsen’s original sentence, and remand for further proceedings. On remand, if the court proceeds to exercise its authority under Iowa Code section 903.2, it should base any new sentence on evidence establishing the facts of the new information.

WRIT SUSTAINED.