

IN THE COURT OF APPEALS OF IOWA

No. 0-456 / 09-1242
Filed July 28, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRANDON R. HARRIS,
Defendant-Appellant.

Appeal from the Iowa District Court for Emmet County, Don E. Courtney,
Judge.

Brandon Harris appeals the district court order extending the term of his
probation. **AFFIRMED IN PART AND REVERSED IN PART.**

Mark C. Smith, State Appellate Defender, and E. Frank Rivera, Assistant
Appellate Defender, for appellant.

Brandon R. Harris, Lake Park, pro se.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney
General, Douglas Hansen, County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ. Tabor,
J., takes no part.

MANSFIELD, J.

Brandon Harris appeals from the district court's order holding him in contempt of court for a probation violation, sentencing him to jail for ninety days, and extending the length of his probation by two years. On appeal, Harris only challenges whether the district court had the statutory authority to extend his probation. We find the district court lacked the statutory authority to extend his probation, and thus reverse that portion of his sentence.

I. Background Facts and Proceedings.

On July 5, 2006, the State filed a trial information charging Harris with possession of a controlled substance (cocaine) with the intent to deliver within 1000 feet of a public elementary school in violation of Iowa Code sections 124.401(1)(c)(2)(b) and 124.401A (2005), a class "C" felony. The State further sought an enhanced sentence pursuant to section 124.411, and a habitual offender sentence pursuant to sections 902.8 and 902.9(3).

On January 29, 2007, pursuant to a plea agreement, Harris pled guilty to the possession charge in exchange for the State dismissing the sentencing enhancements under sections 124.401A, 124.411, 902.8, and 902.9(3).¹ The State further recommended a suspended sentence and probation.

On March 12, 2007, the district court entered judgment and sentenced Harris to an indeterminate term not to exceed ten years with all years suspended, and placed him on probation for a term of two years. See Iowa Code § 907.7 (authorizing a length of probation not less than two years, but not to exceed five

¹ During the hearing, the State conceded that Harris had only one other felony conviction, and thus the habitual offender sentencing enhancement under sections 902.8 and 902.9(3) "would be dismissed regardless of a plea agreement."

years, for felony offenses). The court further assessed the minimum fines and surcharges as well as probation supervision fees, court-appointed attorney fees, and the costs of the action. The court also set forth a list of terms and conditions for Harris's probation.

On October 20, 2008, the district court approved a restitution payment plan whereby Harris agreed his total restitution obligation was \$1925.50 and he would pay \$60 per month until the total was paid in its entirety. Around this same time, Harris also agreed to pay a supervision fee of \$200 at the rate of \$25 per month.

On February 9, 2009, Harris filed an application for an extension of his probation for one year citing his outstanding fines, surcharges, and court costs. The application was granted by the district court.

On June 18, 2009, Harris's probation officer filed a probation violation report alleging Harris had failed to abstain from the use of alcohol and illegal drugs on more than one occasion, failed to obey all state laws, failed to follow through on a chemical abuse evaluation, failed to secure and maintain employment, failed to report changes in his address, and failed to pay all fines, surcharges, and court costs owed. Thereafter, the State requested a probation revocation hearing.

The probation revocation hearing was held July 13, 2009. At the hearing, the probation officer testified that Harris had tested positive for marijuana on two occasions and had received an alcohol-related citation during his probation. The probation officer further testified that Harris had sporadic employment, needed a substance abuse reassessment, and refused to disclose his address or location

when specifically asked. The probation officer also stated that Harris continued to owe \$403 under the restitution plan and \$150 in supervision fees.

At the close of the evidence, the district court found Harris had violated the terms of his probation. In determining the proper punishment, the district court stated:

I feel that sending Mr. Harris to prison right now is a little on the harsh side, but I want obviously consequences because he has violated probation. He had a cavalier attitude about probation. I get the impression that when it's not convenient for him he chooses to do what he wants to do, so I want consequences.

Accordingly, the district court determined Harris should be held in contempt of court pursuant to Iowa Code section 908.11(4) and sentenced him to ninety days in jail. The court further ordered Harris's probation be "continued upon the same conditions previously ordered; except the term of [Harris's] probation is extended to March 12, 2012" (i.e., the five year maximum length allowed under section 907.7).

On August 19, 2009, Harris filed a pro se request for writ of certiorari. Our supreme court treated the request as an application for delayed appeal and granted the application. The matter was subsequently transferred to our court.

II. Standard of Review.

Harris's sole issue on appeal is whether the district court had the statutory authority to extend his probation. This is a challenge to the legality of the sentence imposed. *State v. Lathrop*, 781 N.W.2d 288, 294 (Iowa 2010); see also *State v. Bruegger*, 773 N.W.2d 862, 871 (Iowa 2009) ("[A] challenge to an illegal sentence includes claims that the court lacked the power to impose the sentence or that the sentence itself is somehow inherently legally flawed, including claims

that the sentence is outside the statutory bounds or that the sentence itself is unconstitutional.”). Therefore, we will examine the sentence to determine whether it complies with the relevant statutes. *State v. Maxwell*, 743 N.W.2d 185, 190 (Iowa 2008). Our review is for correction of errors at law. *Id.*

III. Analysis.

When a probation violation is established, the court may:

[1] continue the probation . . . with or without an alteration of the conditions of probation . . . , [2] hold the defendant in contempt of court and sentence the defendant to a jail term while continuing the probation . . . , [3] order the defendant to be placed in a violator facility established pursuant to section 904.207 while continuing the probation . . . , or [4] revoke the probation . . . and require the defendant to serve the sentence imposed or any lesser sentence, and, if imposition of sentence was deferred, may impose any sentence which might originally have been imposed.

Iowa Code § 908.11(4). The particular language of this statute grants the district court four alternatives when a probation violation is established. However, none of these alternatives expressly allow the district court to extend the length of the defendant’s probation.²

² Several other jurisdictions have statutes or rules that expressly permit extension of the probation term when a violation has been established. See, e.g., Ala. Code § 15-22-54(a) (2009) (“The period of probation or suspension of execution of sentence shall be determined by the court, and the period of probation or suspension may be continued, extended, or terminated.”); Alaska Stat. § 12.55.090(b) (2009) (“The court may revoke or modify any condition of probation, or may change the period of probation.”); Ind. Code § 35-38-2-3(g)(2) (2009) (“If the court finds that the person has violated a condition . . . , the court may . . . [e]xtend the person’s probationary period for not more than one (1) year beyond the original probationary period.”); Mich. Court Rule 6.445(G) (2009) (“If the court finds that the probationer has violated a condition of probation, . . . the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration.”); Miss. Code Ann. § 47-7-37 (2009) (“The period of probation shall be fixed by the court, and may at any time be extended or terminated by the court, or judge in vacation.”); Mo. Ann. Stat. § 559.036(3) (West 2009) (“If the defendant violates a condition of probation . . . , the court may continue him on the existing conditions, with or without modifying or enlarging the conditions or extending the term”); Neb. Rev. Stat. § 29-2268(2)(d) (2009) (“If the court find that the probationer did violate a condition

The State argues that by allowing the district court to “continue” a person’s probation, the legislature authorized the court to *extend* that person’s probation, so long as the new term of probation complies with section 907.7. We do not agree. It is true the word “continue” has two potential meanings. It can mean “maintain” or “prolong.” See Merriam-Webster’s Collegiate Dictionary 270 (11th 2004) (listing “maintain” and “prolong” as two alternative definitions when “continue” is used as a transitive verb). The State urges us to adopt an interpretation that includes the second meaning. But we have several problems with this approach.

First, in section 910.4(1)(b), regarding restitution, the General Assembly expressly authorized courts to extend the probationary period when the probation violation amounts to a failure to comply with a court-ordered restitution plan. See Iowa Code § 910.4(1)(b) (“If an offender fails to comply with restitution requirements during probation, the court may hold the offender in contempt, revoke probation, or extend the period of probation.”). The fact that the General Assembly expressly authorized extension of the probationary period for a restitution violation implies exclusion of the same authority when not expressly mentioned for other probation violations. See *Marcus v. Young*, 538 N.W.2d 285, 289 (Iowa 1995) (“[T]he well-established rules of statutory construction

of his probation . . . , the court may order that . . . [t]he probationer’s term of probation be extended”); N.C. Gen. Stat. Ann. § 15A-1345(e) (West 2009) (“Before revoking or extending probation, the court must . . . hold a hearing to determine whether to revoke or extend probation”); N.D. Cent. Code § 12.1-32-06.1(5) (2009) (“In felony cases, in consequence of violation of probation conditions, the court may impose an additional period of probation not to exceed five years.”); see also 18 U.S.C. § 3565(a)(1) (2000) (“If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may . . . continue him on probation, with or without extending the term or modifying or enlarging the conditions.”).

[show] that legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned.”). Further, if section 908.11(4) already allowed courts to extend probationary terms for probation violations, the separate language in section 910.4(1)(b) would be superfluous. See Iowa Code § 4.4 (disfavoring such constructions).

Second, as the partial survey set forth in footnote 1 indicates, if the General Assembly had wanted to give courts authority to extend a term of probation as a sanction for violation of probation, it could have easily done so by using an unambiguous term like “extend.” That is what other legislatures have done. See *Marcus*, 538 N.W.2d at 289 (“[I]n our search for legislative intent, we are to be guided by what the legislature actually said, rather than what it should or could have said. We cannot, under the guise of construction, enlarge or otherwise change the terms of a statute as the legislature adopted it.”).

Third, we are aware of at least one other jurisdiction that has interpreted a similarly worded statute as *not* authorizing extensions of probationary terms. In *State v. Guckian*, 605 A.2d 874, 885 (Conn. Ct. App. 1992), *aff’d*, 627 A.2d 407 (Conn. 1993), the Appellate Court of Connecticut considered that state’s law, which authorizes the court to “continue or revoke the sentence of probation” upon a finding of a probation violation. The court concluded the statute “does not authorize an increase in a defendant’s probation.” *Guckian*, 605 A.2d at 885; see also *State v. Strickland*, 667 A.2d 1282, 1286 (Conn. Ct. App. 1995) (“Upon a finding of a violation, the statute affords a trial judge only two choices: either to

continue or to revoke the probation. . . . No statutory authority exists to extend a period of probation.”).

In addition, we cannot find that the “length” of probation is a “condition” of probation that may be modified under the first alternative of section 908.11(4). See Iowa Code § 908.11(4) (providing that upon a finding of a probation violation, the court may “continue the probation . . . with or without an alteration of the conditions of probation”). Chapter 907, regarding probation, draws a clear distinction between the “conditions” of probation, which are covered in section 907.6, and its “length,” which is covered in section 907.7. Again, if the length of probation were a mere “condition” that could be altered pursuant to section 908.11(4), there would be no need for the separate language in section 910.4(1)(b), authorizing extension of the period of probation when an offender fails to comply with restitution requirements.

In the alternative, the State here argues that Harris failed to comply with the court-ordered restitution plan, and thus the district court had the power to extend his probation pursuant to section 910.4(1)(b). According to the State, at the time of the probation revocation hearing, Harris continued to owe \$553 in restitution. However, the problem with this argument is that the district court did not find Harris in violation of his restitution obligations. In fact, Harris appears to have been ahead of the payment schedule, at least in regards to his primary obligation. At the time of the revocation hearing (only nine months into his payment plan), Harris had already paid \$1522.50 of his primary restitution obligation and only had a remaining balance of \$403 left.

Finally, the State advances what is essentially a policy argument. The State contends, “The facts of this case illustrate the need for the district court to have a complete set of options when dealing with probation violations.” However, how much discretion courts should have in this area is ultimately the legislature’s call. As our supreme court has noted, “[a]lthough the sentencing judge has discretion with respect to the conditions of probation, that discretion must be exercised ‘within legal parameters.’” *Lathrop*, 781 N.W.2d at 294 (quoting *State v. Formaro*, 638 N.W.2d 720, 725 (Iowa 2002)). “The sentencing process is not the sole province of the judiciary. The legislature possesses the inherent power to prescribe punishment for crime, and the sentencing authority of the courts is subject to that power.” *State v. Ohnmacht*, 342 N.W.2d 838, 842 (Iowa 1983). Here, the legislature decided to give the district court four alternatives for addressing probation violations, at least when the violation involves something other than failure to pay restitution. We believe courts are bound by those options.³

Because the district court lacked the statutory authority to extend Harris’s probation by two years, we reverse that portion of his sentence. We affirm the remaining portion of his sentence.

AFFIRMED IN PART AND REVERSED IN PART.

³ We note the General Assembly has recently amended Iowa Code sections 907.7(1), 908.11(4), and 910.4(1)(b) to authorize courts expressly, in the event of probation violations, to “extend the term of probation for up to one year.” See H.F. 2377, 2010 Iowa Legis. Serv. 690 (West). However, the act is not retrospective and only applies to criminal offenses committed on or after July 1, 2010. *Id.* Notably, the Connecticut legislature also amended their statute concerning probation violations (Conn. Gen. Stat. § 53a-32(d)) in 1995 to include a specific section allowing extension of probation. Presumably, this was in response to the decisions we have cited in the main text.