IN THE COURT OF APPEALS OF IOWA

No. 0-702 / 09-1623
Filed December 8, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES JOSEPH HOUSTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Cynthia Moisan, District Associate Judge.

James Houston appeals the district court's order resentencing him pursuant to Iowa Code section 903B.2 (2009). **REVERSED.**

Angela L. Campbell of Dickey & Campbell Law Firm, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, John P. Sarcone, County Attorney, and Linda K. Zanders, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

DANILSON, J.

James Houston appeals the imposition of an additional term of probation pursuant to Iowa Code section 903B.2 (2009) in a resentencing proceeding after his discharge from his original sentence term of probation. Upon our review, we find that a reasonable expectation of finality arose upon Houston's completion of his original sentence and double jeopardy attached precluding his resentencing. We reverse the order resentencing Houston.

I. Background Facts and Proceedings.

In February 2008, the State filed a trial information charging James Houston with invasion of privacy, in violation of Iowa Code section 709.21, for peeping at a woman in a tanning salon without her permission. Houston was seventy years old. He entered a written guilty plea on March 21, 2008. The district court sentenced him to a one-year period of incarceration and suspended the sentence. Houston was placed on probation for twelve months. He completed the sentence, and on April 29, 2009, the court discharged Houston from probation.

Subsequently, the State informed the court that, pursuant to Iowa Code section 903B.2 (special sentence for sex offenses), Houston should have been committed to the Iowa Department of Corrections for "supervision as if on parole" for an additional period of ten years. On June 1, 2009, the court ordered Houston to reappear for resentencing. Following an unreported resentencing hearing on June 24, 2009, the court entered an order sentencing Houston to an additional period of ten years probation, stating "although the original sentence

order did not impose the additional term of probation, Section 903B is mandatory and the sentence must be imposed." Houston now appeals.

II. Scope and Standards of Review.

A sentence imposed by the district court is reviewed for errors at law. Iowa R. App. P. 6.907; *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). Sentencing decisions of the district court are cloaked with a strong presumption in their favor. *Formaro*, 638 N.W.2d at 724. To the extent the defendant raises a constitutional challenge to his resentencing, our review is de novo. *State v. Allen*, 601 N.W.2d 689, 690 (Iowa 1999).

III. Merits.

Houston argues the district court's resentencing was in violation of Iowa Code section 907.9(4), which states: "A person who has been discharged from probation shall no longer be held to answer for the person's offense." He also contends that the court's action in resentencing him after he had been discharged from probation violates his rights against double jeopardy; is not supported by Iowa case law[1]; and is in opposition to public policy that supports the finality of a completed sentence.

Here, the district court's original sentence did not include the special sentence required to be imposed pursuant to Iowa Code section 903B.2 (stating that a person convicted under chapter 709 "shall also be sentenced, in addition to any other punishment provided by law, to a special sentence [of probation] for

[1] In his brief, Houston states, "Nunc pro tunc orders are used to correct clerical mistakes only and may not be used to correct illegal sentences." We agree. However, the record fails to suggest that the court's resentencing order was a nunc pro tunc order, and Houston does not offer any additional support for his assertion.

a period of ten years"). As a general principle, "[a] sentence not authorized by statute is void." *Allen*, 601 N.W.2d at 690. The court may correct an illegal sentence at any time. Iowa R. Crim. P. 2.24(5); *State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010). This principle has been upheld "even in cases in which the illegal sentence was more lenient than that allowed by law and when the correction of the sentence would result in an increase in the sentence." *Allen*, 601 N.W.2d at 690. Sans inclusion of the 903B sentence, Houston's sentence was void. *See State v. Hallock*, 765 N.W.2d 598 (Iowa Ct. App. 2009) (finding original judgment and sentence not valid where it "did not contain the mandatory special sentence set forth in section 903B.2"); *see also State v. Wiese*, 201 N.W.2d 734, 737 (Iowa 1972) ("A sentence not permitted by statute is void.").

The State relies in part on the holding in *State v. Oxberger*, 255 N.W.2d 138, 140 (Iowa 1977), to support its contention that the district court's resentencing of Houston was not improper. In *Oxberger*, the supreme court determined that because the defendant's original sentence was illegal and void, the trial court's discharge of the defendant from probation was also void. *Oxberger*, 255 N.W.2d at 140. Thus, the supreme court concluded the defendant could be resentenced in accordance with the applicable law. *Id*. The State contends that similar to the defendant in *Oxberger*, Houston's original sentence and his discharge from probation were void, and therefore, the court had jurisdiction to resentence him. We disagree.

In *Oxberger*, the State sought review of the defendant's discharges from probation by timely writs of certiorari to the supreme court. *Id*. at 139. Because the writs were sustained, the discharges were held invalid, and the supreme

court remanded the case for resentencing. *Id*. at 140. Here, the State never timely challenged the order discharging Houston from probation. We further differentiate this case from *Oxberger* because Houston has raised arguments concerning the applicability of Iowa Code section 907.9(4),[2] and claims he will be twice put in jeopardy for the same offense if resentenced. Although the sentence imposed on Houston was illegal because it did not include the special sentence required by section 903B, and the order discharging him from probation could have been challenged, we believe Houston was entitled to the protection offered by section 907.9(4) for the reasons to follow. We now turn to Houston's constitutional claim.

Houston argues that his resentencing, or amended sentencing, is a violation of double jeopardy principles of the Federal and Iowa constitutions because the proceedings occurred after he completed his original sentence. *See* U.S. Const. amend. V; Iowa Const. art. I, § 12. He contends he should not be "punished twice for the same offense" and alleges that double jeopardy attached at the time he completed his sentence.

The double jeopardy clause "in part protects against multiple punishments for the same offense." *Allen*, 601 N.W.2d at 690; U.S. Const. amend. V; Iowa Const. art. I, § 12. Probation under 903B constitutes a form of punishment and increases the penalty for a defendant's crime. *See Lathrop*, 781 N.W.2d at 298.

Our supreme court has stated that "a plea of former jeopardy cannot be based on a void sentence." *Allen*, 601 N.W.2d at 690. "This is generally true

[2] Although the court in *Oxberger* did not specifically address Iowa Code section 789A.6, the predecessor to section 907.9(4), in its ruling, we presume that the court did not find section 789A.6 applicable because the discharge order was found invalid.

even if part of the illegal sentence has already been served." *Id*. Our supreme court has concluded (for double jeopardy purposes) that an illegal sentence can be corrected once a defendant *begins to serve* the sentence. However, the court has not addressed whether a sentence can be corrected after a defendant has *completed* the terms that were originally imposed where a claim of double jeopardy was raised. *See State v. Taylor*, 258 Iowa 94, 97, 137 N.W.2d 688, 688-89 (1965) ("We make no determination at this time on the power of the court to correct an invalid sentence after it has been fully executed."); *see also Howell*, 290 N.W.2d at 358 (allowing resentencing after defendant completed jail term, but before defendant completed probation term). The *Oxberger* holding is not helpful in this regard, because the court was not confronted with a double jeopardy claim in that case. *Oxberger*, 255 N.W.2d at 140 ("Our only question in these present proceedings is whether [the district court] acted illegally or exceeded its jurisdiction [under the statute.]").

In fact, few jurisdictions have considered the issue of whether double jeopardy principles are violated when a defendant is resentenced after completing an original sentence that was illegal. Our research indicates, and the State concedes, that of those jurisdictions that have examined the issue, most have found a double jeopardy violation. In so finding, these courts have relied upon the United States Supreme Court's reasoning in *United States v. DiFrancesco*, 449 U.S. 117, 129, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980). According to *DiFrancesco*, the appropriate inquiry in double jeopardy cases is whether at a particular point in time, the defendant has a legitimate expectation of finality in his sentence. *See DiFrancesco*, 449 U.S. at 135-36, 101 S. Ct. at

436-37, 66 L. Ed. 2d at 344-46. Since *DiFrancesco*, the majority view is that after a defendant has *completed* a sentence, a legitimate expectation in the finality of the sentence arises and double jeopardy principles prevent reformation of the original, albeit illegal, completed sentence. *See, e.g.*, *United States v. Silvers*, 90 F. 3d 95, 101 (4th Cir. 1996) ("[O]nce a defendant fully serves a sentence for a particular crime, the Double Jeopardy Clause's bar on multiple punishments prevents any attempt to increase thereafter a sentence for that crime."); *United States v. Daddino*, 5 F. 3d 262, 265 (7th Cir. 1993) (finding that completion of incarceration portion of sentence precluded any increase of it); *United States v. Arrellano-Rios*, 799 F. 2d 520, 524-525 (9th Cir. 1986); *Oksanen v. United States*, 362 F. 2d 74, 80 (8th Cir. 1966) (applying the rule to a completed term of probation); *People v. Williams*, 925 N.E.2d 878, 888-89 (2010); *Sneed v. State*, 749 So.2d 545, 546 (Fla. Dist. Ct. App. 2000).

Our supreme court has discussed double jeopardy principles (but without discussing the validity of the sentence) in determining that a defendant could not be resentenced following discovery of a clerical error in the record where part of the defendant's sentence was omitted by mistake. *Smith v. Dist. Court of Mahaska County*, 132 Iowa 603, 109 N.W. 1085, 1087 (1906). As the court in *Smith* stated:

> There must be a time when the court's jurisdiction over defendant's person by way of punishment ceases. Otherwise, it may continue indefinitely. Can it be possible that such jurisdiction in the same case may be invoked at any time in the future, and, through a nunc pro tunc order, not only a penalty added to the one satisfied of record, but the memory of an expiated crime revived? Shall the possibility of such an order be made a constant menace to the liberty of those once convicted of crime? Shall any of these be cast into prison because, forsooth, after the judgment has been

> satisfied, the memory of those who claim to have heard what the judge said in pronouncing sentence remember it differently than it appears of record? The entire doctrine of correcting records now for then rests upon the necessities in the administration of justice. Notwithstanding the greatest care, errors and omissions will be found in the records, deemed verities, and by this method these are amended lest litigants shall lose the benefits of the adjudication recorded. But the ends of justice will not be served by permitting the state to open the judgment record in a criminal case long after the sentence of the law has been discharged for any purpose, and least of all to insert an additional penalty. To permit this to be done would be like punishing the delinquent the second time for the same offense which is denounced by all of the courts.

Id. We find the above precedent persuasive and use it to guide our analysis in the instant case.

Here, the district court adjudicated Houston, sentenced him to a one-year term of incarceration, and suspended the sentence. Houston was placed on probation for twelve months, which he successfully completed in April 2009. Approximately two months after his discharge from probation, the court resentenced Houston to an additional ten years of probation, the mandatory special sentence for sex offenses pursuant to section 903B.2. Thus, by the time the court realized its mistake, Houston's original sentence had already been served. *See* Iowa Code § 907.9(4) ("A person who has been discharged from probation shall no longer be held to answer for the person's offense.").

As noted above, Iowa courts have the authority to correct illegal sentences at any time. Iowa R. Crim. P. 2.24(5)(*a*). However, there must be some temporal limitation imposed by due process and notions of fundamental fairness

on a court's ability to resentence a defendant.[3] In accord with double jeopardy principles, we conclude that a legitimate expectation of finality arises upon a defendant's completion of the original sentence. It follows that a proper limit on a court's ability to resentence a defendant to correct an illegal sentence should be prior to completion of the original sentence. Once the original sentence is fully served, the attachment of jeopardy and Iowa Code section 907.9(4) preclude the court from resentencing.

Upon our de novo review, we conclude that when Houston was discharged from probation after serving the term ordered by the sentencing court, he had a legitimate expectation that the sentence, although illegal under section 903B.2, was final. Double jeopardy principles and Iowa Code section 907.9(4) prevented the court from thereafter modifying the sentence to include an additional probation term. Accordingly, the district court's order resentencing Houston should be reversed.[4]

REVERSED.

[3] This finding also addresses Houston's argument that the court's resentencing after his discharge from probation violates public policy, and offends the principles of fairness and finality.

[4] Houston also contends the court erred in resentencing him after failing to notify him at the time of his plea that he would be facing an additional ten-year special probation. Considering our conclusion, we need not address this argument.