IN THE COURT OF APPEALS OF IOWA

No. 1-207 / 10-1045
Filed April 13, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ESTEPHEN RENE BRIONES,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Paul L. Macek, Judge.

Estephen Briones appeals from the sentence imposed upon his conviction of escape, in violation of Iowa Code section 719.4(1) (2009). **SENTENCE VACATED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Michael J. Walton, County Attorney, and Jerald Feuerbach, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., Potterfield, J., and Miller, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

POTTERFIELD, J.

Estephen Briones appeals from the sentence imposed upon his conviction of escape. Because the district court failed to exercise its discretion when it imposed sentence on the escape charge, we vacate that sentence and remand for resentencing.

I. Standard of Review.

We review a district court's sentencing decisions for an abuse of discretion. *State v. Evans*, 672 N.W.2d 328, 331 (Iowa 2003). A failure to exercise discretion is error. *See State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996) ("When a sentence is not mandatory, the district court must exercise its discretion in determining what sentence to impose.").

II. Discussion.

Following a bench trial on a stipulated record,[1] the district court found Briones guilty of escape, in violation of Iowa Code section 719.4(1) (2009), which provides in pertinent part:

> A person convicted of a felony . . . who intentionally escapes . . . from a . . . community-based correctional facility . . . to which the person has been committed by reason of the conviction . . . commits a class 'D' felony.[2]

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[1] It was stipulated Briones had been convicted of felonies (first-degree theft and second-degree arson); was assigned to a work release center as a result of his convictions; the work release center was a "community-based correctional facility"; and, having no permission to leave, Briones ran out of the front door of that facility (which had no alarm system or lock) after submitting a positive breath sample.

[2] *See State v. Breitbach*, 488 N.W.2d 444, 449 (Iowa 1992) (clarifying term "physical restraint" used in *Burtlow* "is necessarily involved whenever an individual either is or would be subjected to immediate physical restraint if an attempt to flee from authorities was made"); *State v. Burtlow*, 299 N.W.2d 665, 669 (Iowa 1980) (concluding section 719.4(1) "obviously applies when a person convicted or charged with a felony intentionally departs without authority from a detention facility or institution to which the person has been committed on the conviction or charge").

A. Sentencing options generally. A class "D" felony is subject to a maximum sentence of confinement of five years and a fine. *See* Iowa Code §§ 902.3 (providing that confinement is for an indeterminate term not to exceed the maximum set in section 902.9), 902.9 (providing maximum sentence for class "D" felony is five years and fine of at least $750 but not more than $7500).

In sentencing the defendant, the court is to determine which of "following sentencing options" is "authorized by law for the offense" and "will provide maximum opportunity for the rehabilitation of the defendant, and for the protection of the community":

> 1. If authorized by section 907.3, the court may defer judgment and sentence for an indefinite period in accordance with chapter 907.
> 2. If the defendant is not an habitual offender as defined by section 902.8, the court may pronounce judgment and impose a fine.
> 3. The court may pronounce judgment and impose a fine or sentence the defendant to confinement, or both, and suspend the execution of the sentence or any part of it as provided in chapter 907.
> 4. The court may pronounce judgment and impose a fine or sentence the defendant to confinement, or both.
> 5. If authorized by section 907.3, the court may defer the sentence and assign the defendant to the judicial district department of correctional services.

Id. § 901.5.

Further, "[p]ursuant to section 901.5," the sentencing court "may . . . exercise any of the options contained" in section 907.3, including deferring judgment, deferring sentence, or suspending sentence. *Id.* § 907.3.[3]

[3] We note that, by reason of his prior felony convictions, Briones is ineligible for a deferred judgment, pursuant to section 907.3(1)(b).

B. Sentence imposed. Here, the prosecutor, defense counsel, and the district court all expressed the belief that the court had no discretion and was required to impose a five-year term of incarceration, which was to be served consecutive to the sentence Briones was currently serving. The court stated, "if I had some discretion, I'd probably cut you some slack here." But the court opined, "I have to send you to prison."

On appeal, Briones argues the district court *did* have the discretion to suspend his sentence pursuant to section 901.5(3)—"The court may pronounce judgment and impose a fine or sentence the defendant to confinement, or both, and suspend the execution of the sentence or any part of it as provided in chapter 907." We agree.

In interpreting statutes,

> our primary goal is to give effect to the intent of the legislature. That intent is gleaned from the language of the statute as a whole, not from a particular part only. In determining what the legislature intended we are constrained to follow the express terms of the statute. When a statute is plain and its meaning clear, courts are not permitted to search for meaning beyond its express terms. In determining plain meaning, statutory words are presumed to be used in their ordinary and usual sense and with the meaning commonly attributable to them.
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> If the language of a statute is ambiguous, the manifest intent of the legislature is sought and will prevail over the literal import of the words used. We also note the rule of statutory construction that penal statutes are to be strictly construed, with any doubt resolved against the State and in favor of the accused.

State v. Anderson, 782 N.W.2d 155, 158 (Iowa 2010) (internal quotations and citations omitted).

The legislature knows how to limit the sentencing court's authority to suspend a sentence and has expressly done so in section 907.3. *See State v.*

Wiederien, 709 N.W.2d 538, 541 (Iowa 2006) ("We determine the legislature's intent by the words the legislature chose, not by what it should or might have said."). By its express terms, the options contained in section 907.3 are not applicable "to a forcible felony or to a violation of chapter 709 committed by a person who is a mandatory reporter of child abuse . . . ." Iowa Code § 907.3. Nothing in section 907.3 excludes the options contained therein to an escape. *See Marcus v. Young*, 538 N.W.2d 285, 289 (Iowa 1995) ("We are guided by the maxim "expressio unius est exclusio alterius," meaning the "expression of one thing is the exclusion of another."); *State v. Flack*, 251 Iowa 529, 534, 101 N.W.2d 535, 538 (1960) (noting "legislative intent is expressed by omission as well as by inclusion").

The State, however, points to section 901.8, which governs the imposition of consecutive sentences:

> If a person is sentenced for two or more separate offenses, the sentencing judge may order the second or further sentence to begin at the expiration of the first or succeeding sentence. *If a person is sentenced for escape under section 719.4 or for a crime committed while confined in a detention facility or penal institution, the sentencing judge shall order the sentence to begin at the expiration of any existing sentence.* If the person is presently in the custody of the director of the Iowa department of corrections, the sentence shall be served at the facility or institution in which the person is already confined unless the person is transferred by the director.

(Emphasis added.) The State argues the highlighted provision "contemplates that the sentence will not be suspended. . . . It makes little sense to suspend a

sentence and grant probation to one who has shown a propensity for disregarding the restrictions placed upon him or her."[4]

We acknowledge that pursuant to section 901.8, any sentence imposed for escape must "begin at the expiration of any existing sentence." Yet nothing in section 901.8 mandates the specific sentence to be imposed. As already noted, the sentencing maximums for a class "D" felony are set out in section 902.9 (indeterminate term of confinement not to exceed five years and a fine of at least $750 but not more than $7500). The sentencing options are set out in sections 901.5 and 907.3: suspending the sentence is an option under section 901.5(3)

[4] Our supreme court rejected the State's somewhat analogous argument in *State v. Millsap*, 704 N.W.2d 426, 434 (Iowa 2005). There, the State argued that although probation is ordinarily an option for an aggravated misdemeanor, that avenue is barred by section 901.8, which states "if consecutive sentences are specified in the order of commitment, the several terms shall be construed as one continuous term of imprisonment." *Millsap*, 704 N.W.2d at 434. The court stated:

> If a sentencing court chooses to suspend a sentence, the court has authority to "place the defendant on probation upon such terms and conditions as it may require." *Id.* § 907.3(3). "Probation" is a procedure under which the defendant is released subject to supervision. *Id.* § 907.1(4). Accordingly, a defendant placed on probation for a particular offense is not sentenced to confinement on that charge. Thus, there is no order of commitment on the suspended sentence. *See id.* § 901.7 ("In imposing a sentence *of confinement* for more than one year, the court shall commit the defendant to the custody of the director of the Iowa department of corrections." (Emphasis added.)). Consequently, when the suspended sentence is imposed in a case that includes a charge requiring mandatory imprisonment and is made consecutive to the mandatory sentence, section 901.8 is not implicated because the defendant is not *committed* to serve consecutive sentences. He is committed to serve only the mandatory term of imprisonment; the suspended sentence, for which he is not confined, follows upon completion of the term of imprisonment.
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> As our discussion illustrates, a sentencing court has the option of sentencing a defendant to confinement on one charge and imposing a consecutive, but suspended, sentence on another charge. *While this may be an unusual procedure, section 901.8 does not prevent it*.

Id. (emphasis added).

and 907.3(3). *See Millsap*, 704 N.W.2d 434 ("While this may be an unusual procedure, section 901.8 does not prevent it.").

The State is free to argue to the district court that such a sentence is not appropriate under the circumstances. We merely state that the sentencing provisions do not preclude the option.

III. Conclusion.

A sentencing court has the statutory option of imposing a consecutive, but suspended sentence on a charge of escape. The district court did not believe it had any discretion in sentencing the defendant and thus failed to exercise its discretion. We vacate the sentence and remand for resentencing.

SENTENCE VACATED AND REMANDED.