

IN THE COURT OF APPEALS OF IOWA

No. 2-402 / 11-1602
Filed June 27, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEREMY JOSEPH BLANCHETTE,
Defendant-Appellant.

Appeal from the Iowa District Court for Poweshiek County, Joel D. Yates (plea) and James Q. Blomgren (sentencing), Judges.

Defendant appeals his sentence for possession of marijuana with intent to deliver. **SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Rebecca L. Petig, County Attorney, for appellee.

Considered by Vogel, P.J., Bower, J., and Huitink, S.J.*

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

HUITINK, S.J.

Jeremy Blanchette was charged with possession of less than fifty kilograms of marijuana with intent to deliver, in violation of Iowa Code section 124.401(1)(d) (2011); failure to affix a drug tax stamp, in violation of section 453B.3; and distributing or dispensing a controlled substance to another, in violation of section 124.402(1)(b). The State alleged he had been transporting about nine pounds of marijuana in his vehicle.

Blanchette entered into a plea agreement in which he pleaded guilty to the charge of possession of marijuana with intent to deliver, a class "D" felony, and the other charges were dismissed. Additionally, the State agreed to recommend a suspended sentence. The district court accepted Blanchette's guilty plea on June 13, 2011.

The case proceeded to a sentencing hearing on August 29, 2011. The State recommended Blanchette be given a suspended sentence and placed on probation. The district court asked the prosecutor, "With regard to probation, is there a recommended term of probation?" The prosecutor replied, "No, Your Honor. Whatever is within the Court's discretion." Defense counsel requested "the shortest term of probation possible be granted by the Court." The court asked, "And what do you believe that term is?" Defense counsel replied, "I believe it would be three years, Your Honor."

The court sentenced Blanchette to a term of imprisonment not to exceed five years, suspended the sentence, and placed him on probation for a period of three years. Blanchette now appeals his sentence. He contends the district court did not properly exercise its discretion in selecting the length of probation

because the court had incorrect information as to the minimum amount of probation that could be ordered.

We review a sentence in a criminal case for the correction of errors at law. *State v. Kramer*, 773 N.W.2d 897, 898 (Iowa Ct. App. 2009). “A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure, such as trial court consideration of impermissible factors.” *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995). Where a court has discretion, it must exercise its discretion, and failure to do so requires vacation of the sentence and remand for resentencing. *State v. Ayers*, 590 N.W.2d 25, 27 (Iowa 1999).

A sentencing court determines the proper length of probation. Iowa Code § 907.7(1); *State v. Canas*, 571 N.W.2d 20, 23 (Iowa 1997). Blanchette pled guilty to a class “D” felony. See Iowa Code § 124.401(1)(d). Under section 907.7(2), for a felony offense the minimum length of probation is two years. See *Canas*, 571 N.W.2d at 23 (“If the offense is a felony, the length of probation is not less than two years and not more than five years.”).

When questioned by the court, defense counsel stated the minimum length of probation that could be ordered was three years, rather than the correct length of two years. The record does not show that defense counsel’s statement was corrected either by the prosecutor or by the court. Blanchette contends the court could not properly exercise its discretion in determining the proper length of probation because the court had been misinformed as to the minimum length permitted by statute.

The State asserts the sentencing court may have been aware the correct minimum length of probation for a felony was two years. The State claims the court could have properly exercised its discretion by choosing to impose probation for three years, which is within the statutory mandates for a felony of between two years and five years. See Iowa Code § 907.7(1), (2).

The problem in this case, however, is that nowhere in the record does it show that any of the parties brought to the court's attention the fact Blanchette could be ordered to be on probation for between two years and five years. The only information on the subject is defense counsel's incorrect statement that the minimum length was three years. Based on the evidence presented at the time of the sentencing hearing, we conclude Blanchette's sentence must be vacated and the case remanded for resentencing.

SENTENCE VACATED AND REMANDED FOR RESENTENCING.