IN THE COURT OF APPEALS OF IOWA

No. 2-667 / 11-1622
Filed September 6, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTWAN ANTONIO JOHNSON SR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Johnson appeals the sentences imposed following his conviction. **SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel A. Dalrymple, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Danilson and Mullins, JJ.

VOGEL, P.J.

Antwan Johnson appeals his conviction and sentence for multiple offenses arising out of an incident at the home of the mother of his child. The facts of the incident for the purpose of this appeal are largely undisputed. Johnson arrived at Kimberly Streif's home with the couple's sixteen-month-old child. Johnson did not want to babysit the child as he was upset Streif was dating another man. Streif took the child out of the car seat and then walked with Johnson to her car to retrieve some of Johnson's belongings. While walking, Johnson struck Streif in the back of the head three times, causing Streif to drop the child. Streif picked up the child, ran to a neighbor's house, and asked the neighbor to call the police. Meanwhile Johnson retrieved a gun from under the seat in the car and pointed it at Streif and the neighbor. The neighbor screamed, and Streif turned around, saw the gun, and ran into the neighbor's home. Johnson retreated to his car and drove away.

Johnson was charged with seven offenses arising out of this incident. At issue in Johnson's first claim on appeal are only the convictions for count I, intimidation with a dangerous weapon, a class C felony enhanced as an habitual offender, in violation of Iowa Code sections 708.6 and 902.8 (2011), and count VI, domestic abuse assault by the use or display of a dangerous weapon, an aggravated misdemeanor, in violation of section 708.2A(2)(c). Johnson asserts the district court erred by failing to merge these two convictions.

In his second claim on appeal, Johnson asserts the district court erred in ordering him to serve the sentence for count VII, domestic abuse assault causing

bodily injury, a serious misdemeanor, in the custody of the county rather than in the custody of the director of the department of corrections.

We review Johnson's claims that his sentence is illegal for correction of errors at law. *State v*. *Hall*, 740 N.W.2d 200, 202 (Iowa 2007).

Johnson concedes that the intimidation and domestic abuse charges do not satisfy the normal impossibility test for merger. *See State v*. *Hickman*, 623 N.W.2d 847, 850 (Iowa 2001) (stating under the impossibility test the court compares the two offenses to determine whether it is possible to commit the greater offense without also committing the lesser offense). However, Johnson argues the final sentence of section 708.2A(2)(c) demonstrates the legislature's intent that a singular punishment be enforced for these two offenses.

Section 708.2A.(2)(c) provides in part that domestic assault abuse is an aggravated misdemeanor if the person uses or displays a dangerous weapon in connection with the assault, but notes "[t]his paragraph does not apply if section 708.6 or 708.8 applies." Section 708.6 is the code section defining the crime of intimidation with a dangerous weapon. Thus, under the applicable code sections, domestic abuse assault merges into the intimidation with a dangerous weapon conviction where both crimes arise from the same incident.

We find, and the State agrees, that when the same facts give rise to both convictions, the domestic abuse assault conviction merges into the intimidation conviction. *See State v*. *Ray*, 516 N.W.2d 863, 867 (Iowa 1994) (interpreting identical language in section 708.2(3) to mean "the legislatures expressly identified [these two crimes] as crimes sufficiently similar to merit freedom from duplicate punishment"). We therefore find the district court erred by imposing a

judgment and sentence on the conviction for count VI, domestic abuse assault by the use or display of a dangerous weapon. We vacate the judgment and sentence entered on that conviction and remand for resentencing. *See Hickman*, 623 N.W.2d at 852 (remanding the case for resentencing after vacating the judgment and sentence on the willful injury conviction as it concluded the conviction merged with the first-degree robbery conviction).

Johnson also claims the district court erred by ordering him to be committed to the custody of the county sheriff for one year on count VII, domestic abuse assault causing bodily injury conviction, when he was ordered committed to the director of the department of corrections for all other convictions.

Iowa Code section 903.4 provides, in part,

> All persons sentenced to confinement for a period of one year or less shall be confined in a place to be furnished by the county where the conviction was had unless the person is presently committed to the custody of the director of the Iowa department of corrections, in which case the provisions of section 901.8 apply. All persons sentenced to confinement for a period of more than one year shall be committed to the custody of the director of the Iowa department of corrections to be confined in a place to be designated by the director . . . .

Iowa Code section 901.8 provides, in part,

> 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 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. Except as otherwise provided in section 903A.7, if consecutive sentences are specified in the order of commitment, the several terms shall be construed as one continuous term of imprisonment.

The district court sentenced Johnson on all seven convictions. It ordered the sentences for the first three counts and the final three counts to run concurrent with each other for a total term of incarceration not to exceed fifteen years and a mandatory minimum of three years. The two-year sentence for count IV, the carrying weapons conviction, was ordered to run consecutive to the other sentences. The total term of incarceration imposed was seventeen years, and all sentences were ordered to be served in the custody of the director of the department of corrections except the sentence for count VII, domestic abuse assault causing bodily injury, which was ordered to be served in the custody of the county sheriff.

As section 901.8 provides that consecutive sentences are to be construed as one continuous term and as the length of the term in Johnson's case exceeds one year, we find the district court should have ordered Johnson committed to the director of the department of corrections on all the sentences including the sentence for the domestic abuse assault causing bodily injury conviction. Therefore, we vacate that sentence as well and direct on remand for resentencing, the proper place of confinement is in the custody of the director of the department of corrections. *See State v. Patterson*, 586 N.W.2d 83, 84 (1998) (remanding the case for resentencing after finding the district court imposed an illegal sentence by designating the county jail as the place of confinement for the defendant's suspended consecutive sentences which together exceeded one year).

SENTENCE VACATED AND REMANDED FOR RESENTENCING.