

IN THE COURT OF APPEALS OF IOWA

No. 2-745 / 12-0018
Filed September 19, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JESUS SANDOVAL,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mark J. Smith,
Judge.

Jesus Sandoval appeals from his sentence for driving while barred.

**AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR
RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney
General, Michael J. Walton, County Attorney, and Joseph Grubisich, Assistant
County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

POTTERFIELD, J.

Jesus Sandoval appeals from the sentence imposed following his conviction for driving while barred. He contends the district court imposed an illegal sentence by requiring him to submit to DNA profiling. We vacate in part and remand for resentencing, finding the district court's sentence was not authorized by statute.

I. Facts

Jesus Sandoval pleaded guilty to driving while his license was barred as an habitual offender. Sandoval had an extensive criminal past, including five prior offenses for driving while suspended or barred, public intoxication, and possession of a controlled substance. The court noted in its colloquy with Sandoval that he "is not getting the message . . . [he is] a risk to the community . . . and [he] just can't avoid committing criminal acts[.]" Sandoval was convicted of driving while barred and was sentenced to serve an indeterminate term of two years, pay fines of \$625.00 and submit a DNA sample for profiling. Sandoval appeals only the DNA sampling part of his conviction, contending it is an illegal sentence.

II. Analysis

We review the district court's sentencing for the correction of errors at law. *State v. Shearon*, 660 N.W.2d 52, 57 (Iowa 2003). An illegal sentence is one not authorized by statute. *Id.* Section 901.5(8A) of the Iowa Code allows for the district court to order the defendant to submit a physical specimen for DNA

profiling when appropriate.¹ In doing so, “the court shall consider the deterrent effect of DNA profiling, the likelihood of repeated offenses by the defendant, and the seriousness of the offense.” Iowa Code § 901.5(8A)(b). The language of the statute requires the court to consider all three factors when imposing the sample requirement.

Our review of the sentencing record reveals that, while the court did not tell Sandoval about the DNA sampling requirement in its colloquy, the court was very concerned about Sandoval’s repeated offenses, his likelihood to continue committing such offenses, and his danger to the community. Sandoval’s criminal record included five driving under suspension or while barred, two public intoxication offenses, and a possession of marijuana. The court did explicitly tie its concerns about re-offending to the imposition of the maximum sentence for driving while barred, stating:

There comes a point in time where after five driving under suspensions or driving while barred convictions you have to face the fact that you are not getting the message, and . . . one of the responsibilities I have is to protect the community from people who commit further criminal acts.

The court’s written sentencing order requiring DNA profiling, however, did not make any reference to any of the three factors required to be considered when requiring DNA sampling.

While it appears the district court did desire to deter Sandoval from further criminal acts, it did not consider the “deterrent effect of *DNA profiling*[.]” Iowa

¹ Driving while barred is not one of the offenses listed in the statute as automatically requiring DNA sampling, such as a felony, an offense requiring registry as a sex offender, or one constituting sexually violent predator status. Iowa Code §§ 81.2(1), 901.5 (2011).

Code § 901.5(8A)(b) (emphasis added). Though it certainly considered the likelihood of Sandoval's repeated offenses and the seriousness of his offense, consideration of all three factors is required by the statute and is not apparent on this record. We therefore cannot find this part of the sentence was authorized by statute and strike the DNA sample requirement without disturbing the remainder of Sandoval's sentence. *State v. Hutt*, 548 N.W.2d 897, 898 (Iowa Ct. App. 1996).

AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR RESENTENCING.