

IN THE COURT OF APPEALS OF IOWA

No. 2-804 / 12-0168
Filed September 19, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RONALD ROBERT BECKER,
Defendant-Appellant.

Appeal from the Iowa District Court for Benton County, Mitchell E. Turner,
Judge.

A defendant contends the district court abused its discretion in ordering
him to submit to DNA profiling pursuant to Iowa Code section 901.5(8A) (2011).

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

James T. Peters, Independence, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney
General, David C. Thompson, County Attorney, and Emily K. Nydle, Assistant
County Attorney, for appellee.

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

VAITHESWARAN, P.J.

Ronald Becker pled guilty to operating a motor vehicle while intoxicated (second offense). See Iowa Code § 321J.2 (2011). The district court imposed judgment and sentence and placed Becker on formal probation for a period of two years. The court additionally stated, “Pursuant to Iowa Code section 901.5(8A), Defendant is ORDERED to submit to a DNA profile upon request, if defendant has not already done so.”

On appeal, Becker contends the district court abused its discretion in imposing this final condition. He asserts “[t]here is no reasonable relationship between [his] OWI conviction and the requirement of DNA sampling as a term of probation.”

Iowa Code section 901.5(8A) addresses DNA profiling. Section 901.5(8A)(a) requires DNA profiling when a defendant is convicted of certain offenses identified in section 81.2. Section 901.5(8A)(b) allows the court to order DNA profiling “if appropriate.” The provision continues, “In determining the appropriateness of ordering DNA profiling, the court shall consider the deterrent effect of DNA profiling, the likelihood of repeated offenses by the defendant, and the seriousness of the offense.” *Id.* § 901.5(8A)(b).

OWI (second) is not an offense that requires DNA profiling. See *id.* § 81.2 (1)–(4). Therefore, if DNA profiling is ordered for this offense it would have to be under the discretionary provision, section 901.5(8A)(b). See *State v. Shearon*, 660 N.W.2d 52, 57 (Iowa 2003). Becker is correct that the district court did not exercise its discretion under this provision.

The court's failure to exercise its discretion would generally require a remand for resentencing. See *State v. Hutt*, 548 N.W.2d 897, 898–99 (Iowa Ct. App. 1996) (severing invalid portion of sentence from proper portion and remanding for resentencing on the invalid portion). The State argues that disposition is not required here. In its view, "The court's reference to DNA profiling was not an exercise of its discretion under Iowa Code section 901.5(8A)(b) but rather notice to the defendant of his obligations under section 81.2(5)."

Section 81.2 (5) states:

An offender placed on probation shall immediately report to the judicial district department of correctional services after sentencing so it can be determined if the offender has been convicted of an offense requiring DNA profiling. If it is determined by the judicial district that DNA profiling is required, the offender shall immediately submit a DNA sample.

This provision sets forth the logistics for determining whether a DNA sample is required under section 901.5(8A)(a), and for obtaining a sample. Nothing in the provision requires a district court to notify a defendant of these logistical details. Additionally, the district court did not cite to section 81.2(5), but to section 901.5(8A). While the court qualified its order by requiring Becker to submit a DNA profile "upon request," if he had not already done so, those qualifiers did not change the fact that the court ordered DNA profiling without considering the three factors enumerated in section 901.5(8A)(b). For this reason, we have no option but to vacate that portion of the sentencing order and remand for resentencing on

that portion. We affirm Becker's judgment for operating a motor vehicle while intoxicated (second offense) and the balance of his sentence.

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