

**IN THE COURT OF APPEALS OF IOWA**

No. 3-746 / 12-1435  
Filed August 21, 2013

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**RANDY JONES,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Douglas F. Staskal,  
Judge.

Randy Jones appeals from his conviction and sentence for indecent  
exposure following a jury trial. **SENTENCE AND NUNC PRO TUNC ORDER  
VACATED; REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney  
General, John P. Sarcone, County Attorney, and Kevin D. Hathaway, Assistant  
County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Vaitheswaran and Doyle, JJ.

**DOYLE, J.**

Randy Jones appeals from his conviction and sentence for indecent exposure following a jury trial, contending the district court's sentence was illegal. He also asserts claims pro se. Because we agree a nunc pro tunc order is not the proper method for correcting his sentence, we vacate the order and sentence, and we remand for resentencing.

In 2012, Jones was charged with indecent exposure, in violation of Iowa Code section 709.9 (2011), a serious misdemeanor punishable by up to a year incarceration. Following a jury trial, Jones was found guilty as charged.

A sentencing hearing was later held. There, Jones stipulated he had a prior conviction of indecent exposure from 2010. Because that crime is a sexually predatory offense, see Iowa Code section 901A.1, Jones's sentence for his current conviction was subject to an enhanced sentence as mandated by section 901A.2(1): "A person convicted of a sexually predatory offense which is a serious . . . misdemeanor, who has a prior conviction for a sexually predatory offense, shall be sentenced to and shall serve twice the maximum period of incarceration for the offense." Pursuant to that section, the district court sentenced Jones to two years in prison. See *id.* § 901A.2(1). However, the court inadvertently failed to include the additional sentence required under section 901A.2(8): "[A] person convicted of a sexually predatory offense . . . shall be sentenced to an additional term of parole or work release not to exceed two

years.” The remainder of the court’s ordered sentence for the conviction is not relevant here.<sup>1</sup>

In August 2012, Jones filed his notice of appeal. Thereafter, the district court entered its “order nunc pro tunc,” adding to Jones’s sentence an additional two-year period of parole or work release, pursuant to section 901A.2(8).

On appeal, Jones challenges the district court’s initial sentence as illegal. The State concedes Jones’s initial sentence was “incomplete.” “A sentence that is not authorized by statute is an illegal sentence.” *State v. Draper*, 457 N.W.2d 600, 605 (Iowa 1990). “[A]n illegal sentence includes claims that the court lacked the power to impose the sentence or that the sentence itself is somehow inherently legally flawed.” *State v. Bruegger*, 773 N.W.2d 862, 871 (Iowa 2009). Not having incorporated the additional two-year period of parole or work release as mandated by section 901A.2(8), we conclude Jones’s initial sentence was illegal.

The district entered a nunc pro tunc order to add the additional sentence mandated under section 901A.2(8). Our supreme court has specifically emphasized:

[T]he function of a nunc pro tunc order is to make the record show truthfully what judgment was actually rendered—not an order now for then, but to enter now for then an order previously made. A court may not use a nunc pro tunc order for the purpose of correcting judicial thinking, a judicial conclusion or a mistake of law. In reviewing a nunc pro tunc order, this court has declared that the intent of the trial judge is critical.

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<sup>1</sup> The remainder of his sentence included a ten-year special sentence pursuant to Iowa Code section 903B.2; a suspended fine; DNA submission; sex offender registration; and restitution, surcharges and court costs. The sentences were ordered to be served consecutively with the sentence for which Jones was on parole.

*State v. Johnson*, 744 N.W.2d 646, 648-49 (Iowa 2008) (internal quotation marks and citations omitted). Jones asserts the court's attempt to correct its mistake via a nunc pro tunc order was ineffective. The State concedes the district court's actions were not appropriate as a nunc pro tunc order, but it requests we treat the order as a correction of sentence order pursuant to Iowa Rule of Criminal Procedure 2.24(5). We must decline the State's invitation.

“[T]he imposition of a sentence that is not permitted by statute is an illegal sentence, and such sentence is void and must be vacated,” and a new sentence must be rendered. *State v. Suchanek*, 326 N.W.2d 263, 265-66 (Iowa 1982). We are bound by our supreme court's pronouncements. See *State v. Hughes*, 457 N.W.2d 25, 28 (Iowa Ct. App. 1990) (citing *State v. Eichler*, 83 N.W.2d 576, 578 (1957) (“if our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves.”)); *State v. Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990) (“We are not at liberty to overturn Iowa Supreme Court precedent.”). Consequently, we cannot construe the district court's nunc pro tunc order as a correction of an illegal sentence. Accordingly, we vacate the nunc pro tunc order and sentence, and we remand for resentencing on Jones's indecent exposure conviction.

Additionally, Jones filed a separate pro se brief. However, his brief fails to comply with the rules of appellate procedure in a number of ways governing form and content. We are not bound to consider a party's position when the brief substantially departs from the rules of appellate procedure. See *In re De Tar*, 572 N.W.2d 178, 180 (Iowa Ct. App. 1997). Moreover, we do not consider

issues raised for the first time on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Therefore, we do not consider Jones's pro se brief.

**SENTENCE AND NUNC PRO TUNC ORDER VACATED; REMANDED FOR RESENTENCING.**