IN THE COURT OF APPEALS OF IOWA

No. 6-573 / 05-1550
Filed August 23, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHARLES LEE LONG,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, Michael G. Dieterich, District Associate Judge.

A defendant appeals following his sentence by the district court. **CONVICTION AFFIRMED. SENTENCE AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Lisa Taylor, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

VOGEL, P.J.

Charles Long appeals following the district court's sentencing on his guilty plea and conviction for possession of a controlled substance (marijuana) third offense, in violation of Iowa Code section 124.401(5) (2003). Our review of sentencing is for correction of errors at law. Iowa R. App. P. 6.4. A sentence will not be reversed unless there has been an abuse of discretion or a defect in the sentencing procedure. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002).

Long argues on appeal that the district court abused its discretion in failing to allow him to exercise his right to allocution during the sentencing hearing. Iowa Rule of Criminal Procedure 2.23(3)(*d*) states that, prior to imposition of sentence, "[C]ounsel for the defendant, and the defendant personally, shall be allowed to address the court where either wishes to make a statement in mitigation of punishment." The sentencing court is not required to use any specific language to satisfy a defendant's right of allocution, and substantial compliance with the rule is sufficient. *State v. Duckworth*, 597 N.W.2d 799, 800 (Iowa 1999). Long testified at the sentencing hearing, and the district court asked him more than once following his testimony, "Anything else you want to say?" At the conclusion of all testimony, the court again inquired, "Anything else? Anybody? Anyone else have anything to say?" Neither Long nor his counsel indicated that Long wished to further address the court. We conclude that the district court substantially complied with Rule 2.23(3)(*d*) regarding Long's right to allocution and affirm the sentence on this issue.

Long next argues that the district court mistakenly believed it had no discretion to suspend the fine imposed, requiring vacation of that portion of the

sentence. Long plead guilty to possession of marijuana, third offense, which is an aggravated misdemeanor under section 124.401(5). The penalty for this offense is "imprisonment not to exceed two years [and] a fine of at least five hundred dollars but not to exceed five thousand dollars." Iowa Code § 903.1(2). However, section 124.401(5) provides that "[a]ll or any part of [a] sentence imposed pursuant to this subsection may be suspended. . . ." and the specific language of this statute is controlling over the general misdemeanor sentencing provisions of section 903.1. *State v. Lee*, 561 N.W.2d 353, 354-55 (Iowa 1997) (provisions of a specific statute control over those of a general statute). When a sentence is not mandatory under the Iowa Criminal Code, a trial court must exercise discretion in imposing a sentence. *State v. Washington*, 356 N.W.2d 192, 197 (Iowa 1984).

The district court made the following statement at the sentencing hearing:

> All right. Mr. Long, I've been on the bench five years, one month. This is the most extensive criminal record I've ever seen in front of me. There are crimes against people, numerous drug violations.
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> I'm going to sentence you—or commit you to the custody of the Director of Adult Corrections for a term not to exceed two years. . . . In addition I'm required to fine you the mandatory minimum $500, together with surcharge and court costs.

This case is strikingly similar to the sentencing issue raised in *State v. Lee*, 561 N.W.2d 353, 353 (Iowa 1997), where a jury found Lee guilty of possession of marijuana with the intent to deliver in violation of Iowa Code section 124.401(1)(d) (1995), as well as possession of cocaine in violation of section 124.401(3). In *Lee*, when the district court imposed an indeterminate five-year term of incarceration and a $1000 fine on the charge of possession with intent to

deliver, and a one-year concurrent term of incarceration and a $250 fine on the possession charge, it stated the $1000 fine was a "statutory required mandated fine" and the $250 fine was "a minimum statutory fine that must be imposed by the Court." *Id*. at 354. In addition, the court announced several reasons for its decision to impose terms of incarceration. Our supreme court analyzed Lee's argument that the court failed to use discretion when it didn't suspend his fines:

> [Lee] concedes the court gave "thoughtful consideration" to the imposition of the terms of incarceration and challenges only the fines it imposed. He argues the court erroneously believed it did not have any discretion regarding the suspension of the fines. He contends that under *State v. Grey*, 514 N.W.2d 78 (Iowa 1994), the sentencing court had the authority to suspend the $1000 fine imposed pursuant to section 124.401(1)(d). He further contends the $250 fine imposed under section 124.401(3) is not a mandatory minimum fine and may also be suspended. He argues the specific language of section 124.401(3) allowing the suspension of a fine takes precedence over the general misdemeanor sentencing provisions of Iowa Code section 903.1, which would otherwise prohibit the suspension of a fine.
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> We have previously held the language in section 124.401(1)(d) establishing a minimum fine does not remove the court's authority to suspend the fine. *Grey*, 514 N.W.2d at 79. The State concedes the applicability of *Grey* but argues the sentencing court otherwise exercised its discretion by considering various sentencing factors in imposing the fine. We disagree. The sentencing court's language suggests it erroneously believed it had to impose a "statutory required mandated fine" of at least $1000, and it did not exercise any discretion in imposing it. Where a court fails to exercise the discretion granted it by law because it erroneously believes it has no discretion, a remand for resentencing is required. *State v. Washington*, 356 N.W.2d 192, 197 (Iowa 1984). That portion of defendant's sentence imposing a $1000 fine should be vacated and the case remanded for resentencing.
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> With respect to his possession of cocaine, a serious misdemeanor, defendant was sentenced pursuant to section 124.401(3) which specifically provides "[a]ll or any part of a sentence imposed pursuant to this section may be suspended . . . ." This court has previously held a trial court's authority under section 907.3 to suspend a sentence includes the authority to suspend a fine. *State v. Loyd,* 530 N.W.2d 708, 713 (Iowa 1995). The State

> argues the court's authority to suspend a sentence under section 124.401(3) applies only in those cases where probation is a viable sentencing option. We disagree. The reference in section 124.401(3) to probation refers to the court's option of suspending a term of imprisonment, not to its authority to suspend a fine. Section 124.401(3) addresses the punishment for offenses involving the possession of controlled substances, and it allows the suspension of a fine. The specific language of this statute is controlling rather than the general misdemeanor sentencing provisions of section 903.1(1)(b). *See State v. Gobeli*, 342 N.W.2d 898, 899 (Iowa Ct. App. 1983) (provisions of a specific statute control over those of a general statute).
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> It appears from a review of the sentencing transcript that the district court assumed it had no discretion with respect to the imposition of the $250 fine. That portion of the sentence imposing a $250 fine should be vacated and a remand ordered for resentencing on this issue.

Lee, 561 N.W.2d at 354-55.

Normally, the sentencing court need only explain the sentence imposed and not explain why other sentencing options were rejected. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). However, *Lee* instructs the courts that when the statute specifically provides for the option of suspending an imposed sentence, the court must demonstrate on the record its awareness of such discretionary option. *Lee,* 561 N.W.2d at 355. Therefore, in accordance with the dictates of *Lee*, we must vacate the fine imposed on Long's conviction, as it is unclear from the record whether the district court believed it harbored discretion to suspend the fine. We affirm Long's conviction and remainder of his sentence, vacate the fine portion of Long's sentence, and remand to the district court for resentencing on the fine.

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