

**IN THE COURT OF APPEALS OF IOWA**

No. 6-625 / 05-1914  
Filed September 21, 2006

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

**vs.**

**CURTIS DUFFIE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Johnson County, Sylvia A. Lewis,  
Judge.

Curtis Duffie appeals from the imposition of a fine upon his conviction for driving while barred. **SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and Shellie Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, J. Patrick White, County Attorney, and David V. Tiffany, Assistant County Attorney, for appellee-State.

Considered by Sackett, C.J., and Vaitheswaran, J., and Robinson, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

**SACKETT, C.J.**

The defendant-appellant, Curtis Duffie, was convicted of driving while barred in violation of Iowa Code sections 321.555 and 321.560 (2005), following a guilty plea. His license had been barred in part because of five convictions for violations of section 321J.2 (operating while intoxicated) and two convictions for violations of section 321J.21 (driving while suspended, revoked, or barred).

At the sentencing hearing, defense counsel raised the issue of “what the minimum fine is in this case and whether the fine is suspendable or not.” The defense asserted:

It’s our position that because Mr. Duffie is charged with a violation of [sections] 321.560 and 561, which is the straight driving while barred statute, that he is subject to the standard aggravated misdemeanor penalty—minimum penalty of \$500 fine. And it’s our view that that is the minimum fine available to the court in this case, and it’s also the penalty that we are seeking.

Although part of the basis for the barment is related to an earlier OWI, we believe that the statute is clear that if it’s a driving while barred charge, it’s a driving while barred fine, . . .

The State set forth the opposing view:

The dilemma in this case is that if this were what we would call an ordinary driving while barred, it would be an aggravated misdemeanor, and it would have a mandatory minimum fine of up to \$500, which could even be suspended. . . . Unfortunately, when the legislature rewrote section 321J.21 several years ago, they wrote into that that any suspension, revocation, or bar due to a violation of this chapter, 321J, is a serious misdemeanor punishable by a \$1000 fine. That’s where the fight comes in because the bar in this case is due to a violation of chapter 321J, and therefore, instead of being the aggravated misdemeanor, which actually would give Mr. Duffie more preferable or favorable treatment, makes it a serious misdemeanor with a mandatory \$1000 fine. And again, court interpretations of that rewrite have also indicated that that fine is mandatory, it cannot even be suspended. And so Mr. Duffie is in the unfortunate position of being charged with a lesser offense with a greater penalty . . . .

The district court stated:

It's my belief that a bar that involves a 321J violation does fall under the mandatory requirement that the court impose a nonsuspendable \$1000 minimum fine. But for the statutory language, I would not be inclined to fine this defendant in that amount, but I believe that I am bound by the statute.

On appeal, the defendant contends the district court erred in concluding it could not suspend the fine. Iowa Code section 321J.21 provides, in relevant part, "In addition to any other penalties, the punishment imposed for a violation of this subsection shall include assessment of a fine of one thousand dollars." Iowa Code sections 901.5 and 907.3 give courts discretion to defer or suspend sentences except in certain limited circumstances not applicable here. The State acknowledges our supreme court repeatedly has held that the authority to suspend a portion or all of a sentence "is negated only when a specific statute withholds this general sentencing authority." *State v. Klein*, 574 N.W.2d 347, 348-49 (Iowa 1998), citing *State v. Hildebrand*, 280 N.W.2d 393, 397 (Iowa 1979); accord *State v. Chana*, 476 N.W.2d 39-40 (Iowa 1991).

The legislature "knows how to eliminate sentencing options." *State v. Hildebrand*, 280 N.W.2d 393, 397 (Iowa 1979). Section 903.1 provides fines imposed under that section "shall not be suspended by the court." E.g., §§ 321.218 ("The sentence imposed under this section shall not be suspended by the court, notwithstanding the provisions of section 907.3 . . . ."); 805.11 ("penalty is scheduled fine without suspension."). Section 321J.21 contains no such limiting language. The State's argument that the legislature's prohibition of suspended fines for serious misdemeanors in the general misdemeanor sentencing provisions of section 903.1 and subsequent reference to "other

penalties” in section 321J.21 indicates that it did not intend to allow for suspended fines under section 321J.21 is unpersuasive.

We conclude the district court failed to exercise discretion in imposing the fine in this case. A reviewing court will vacate a sentence only for an abuse of discretion or a defect in the sentencing procedure. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). Failing to exercise discretion is a defective sentencing procedure. *State v. Wilson*, 294 N.W.2d 824, 824-25 (Iowa 1980). We therefore vacate the defendant’s sentence and remand for resentencing.

**SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Vaitheswaran, J., concurs; Robinson, S.J., dissents.

**ROBINSON, S.J.**, (dissenting)

I acknowledge the authority to suspend part or all of a sentence “is negated only when a specific statute withholds this general sentencing authority.” *State v. Hildebrand*, 280 N.W.2d 393, 397 (Iowa 1979). The majority concludes Iowa Code section 321J.21, has no limiting provision. I disagree. The legislature specifically provided that driving while barred due to a violation of chapter 321J (OWI) is punishable as a *serious misdemeanor*. The punishment for a serious misdemeanor includes a jail sentence up to one year at the court’s discretion and the imposition of a fine “which fine shall not be suspended.” Iowa Code § 903.1(1). Section 321J.21 specifically incorporates the penalties provided in section 903.1(1) while mandating a fine of \$1000. Thus, the legislature has limited the court’s sentencing discretion in two ways. First, it has mandated that the fine be \$1,000, thus taking away the court’s discretion to assess an amount between \$250 and \$1,500. Second, it eliminated the court’s discretion to suspend the fine by incorporating the sentencing limitation of section 903.1(1).

I would affirm.