

IN THE COURT OF APPEALS OF IOWA

No. 7-241 / 06-1617

Filed April 25, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

REGINALD HENRY SALLIS,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Monica L. Ackley, Judge.

Reginold Sallis appeals from a nunc pro tunc order amending a sentence previously entered. **NUNC PRO TUNC ORDER VACATED; SENTENCE VACATED; AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and David Adams, Assistant State Appellate Defender.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, Ralph Potter, County Attorney, and Christine Corken and Timothy Gallagher, Assistant County Attorneys.

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

EISENHAUER, J.

Reginold Sallis appeals from a nunc pro tunc order amending a sentence previously entered. He contends the court improperly modified the sentence in a nunc pro tunc order. He also contends he was denied due process when he was resentenced without the being afforded the opportunity to be heard. We review his claims for correction of errors at law. Iowa R. App. P. 6.4.

Sallis pled guilty to third-degree sexual abuse in violation of Iowa Code section 709.4(1) (2005) and was immediately sentenced to a term of imprisonment not to exceed ten years. Approximately seven months later, the district court entered a nunc pro tunc order amending the judgment and sentence to provide that after Sallis had discharged his prison sentence, he “shall be committed to the custody of the Director of the Department of Corrections for the remainder of his life pursuant to Iowa Code section 903B.1.”

Sallis argues any error in his sentencing could not be corrected by a nunc pro tunc order as such orders are available only to correct clerical errors, not an error in judicial thinking, a judicial conclusion, or a mistake of law. See *State v. Naujoks*, 637 N.W.2d 101, 113 (Iowa 2001). Iowa Rule of Criminal Procedure 2.23(3)(g) states:

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

The purpose of rule 2.23(3)(g) is not to correct illegal sentences, but rather to

correct clerical mistakes. *State v. Suchanek*, 326 N.W.2d 263, 265 (Iowa 1982). Clerical errors in judgments may be corrected by nunc pro tunc orders. *Id.*

Meanwhile, a sentence that is beyond the court's power to impose is illegal. *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001). Rule 2.24(5)(a) allows a court to correct an illegal sentence at any time. In order to be "illegal" for purposes of rule 2.24(5)(a), the sentence must be one not authorized by statute. *Tindell*, 629 N.W.2d at 359.

An illegal sentence and a clerical error are not the same and we reject the State's contention that "[i]t makes no difference what caption the district court placed on its order" *Suchanek*, 326 N.W.2d at 266 (holding an order setting aside a sentence would itself have to be set aside because the judge "did not have the facts before him to determine whether the judgment entry should be corrected as an illegal sentence under rule 23(5)(a) or corrected for a clerical error under rule 22(3)(g)"). A nunc pro tunc order was not appropriate in this situation, where an illegal sentence needs correction.

Nevertheless, the original judgment and sentence entered by the district court is illegal and subject to correction because it does not comport with the requirements of section 903B.1 (Supp. 2005). See *State v. Draper*, 457 N.W.2d 600, 605 (Iowa 1990) ("[W]hen a sentencing court departs—upward or downward—from the legislatively authorized sentence for a given offense, the pronounced sentence is a nullity subject to correction, on direct appeal or later."). We vacate the district court's nunc pro tunc order as well as the original sentence

for third-degree sexual abuse and remand for resentencing. Because we are setting aside the nunc pro tunc order we need not address Sallis's due process claim.

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