

IN THE COURT OF APPEALS OF IOWA

No. 7-361 / 06-1262
Filed July 12, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MAYO KAKAL,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert,
Judge.

The defendant appeals his convictions and sentences by the district court.
**CONVICTIONS AFFIRMED; SENTENCE VACATED IN PART AND
REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Theresa Wilson, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney
General, John P. Sarcone, County Attorney, and George Karnas, Assistant
County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

VOGEL, J.

Mayo Kakal appeals his convictions and sentences by the district court for willful injury causing serious injury and second-degree harassment, in violation of Iowa Code sections 708.4(1) and 708.7(3) (2003) respectively. We affirm the convictions, vacate his harassment sentence as void, and remand for resentencing.

Kakal first argues that the district court imposed an illegal sentence on his conviction for second-degree harassment, a serious misdemeanor. An illegal sentence is one not authorized by statute, is void, and may be corrected at any time. *State v. Gordon*, 732 N.W.2d 41, 43 (Iowa 2007). The sentencing order on the harassment conviction reads in part, “defendant . . . shall be imprisoned for a period not to exceed 10 years, as provided by Iowa Code sections 902.9 and 902.3. (Count I) + 1 year (Count II)—concurrent.” During the sentencing hearing, the district court made the following record:

You are adjudged guilty of those crimes and shall be imprisoned for a period not to exceed 10 years on the willful injury charge and up to 1 year on the harassment charge. Those sentences shall run concurrent to each other¹

Iowa Code section 903.1(1) specifies that for a serious misdemeanor “the court shall determine the sentence, and shall fix the period of confinement . . . within the following limits: (b) . . . there shall be a fine In addition, the court may also order imprisonment not to exceed one year.” Iowa Code § 903.1(1)(b) (2003). Iowa’s indeterminate sentencing law, section 902.3, is inapplicable to

¹ Where there is a discrepancy between the oral pronouncement of sentence and the written judgment and commitment, the oral pronouncement of sentence controls. See *State v. Hess*, 533 N.W.2d 525, 528 (Iowa 1995).

misdemeanors, meaning that a sentence to jail must specify a definite term or be deemed uncertain and void. *State v. Welfort*, 238 N.W.2d 781, 782 (Iowa 1976); see also *State v. Englebrecht*, 316 N.W.2d 415, 417 (Iowa Ct. App. 1981) (holding an indeterminate sentence imposed on conviction of misdemeanor driving while barred would be vacated and the matter remanded for resentencing). The State asserts that because the “indeterminate” sentence on the misdemeanor conviction runs concurrent with the indeterminate sentence on the felony conviction, the sentence was proper. In the alternative, the State argues Kakal was not harmed by the sentence imposed and instead could actually benefit from the sentence, should the indeterminate sentence on the felony conviction be deemed served prior to the date a determinate sentence on the misdemeanor conviction may be completed. While both assertions have some practical appeal, we conclude that the misdemeanor sentence is nonetheless void, as it is not authorized by statute. The sentence impermissibly imposes an indeterminate term on a serious misdemeanor conviction. We therefore vacate this portion of Kakal’s sentence, and remand for resentencing on Kakal’s conviction for harassment in the second degree.

Kakal also asserts that his trial counsel was ineffective for failing to object to testimony suggesting Kakal’s prior assaultive behavior was directed towards his former girlfriend. We generally preserve claims for postconviction relief proceedings where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant’s claims. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). The testimony in question was elicited from the victim on cross-

examination by Kakal's trial counsel.² From the transcript and the victim's own acknowledgment, it is quite apparent that the victim struggled with the English language. Often during questioning, both counsel for the State as well as defense counsel attempted to clarify what the victim actually meant by his answers. The same is true with the answer he gave which is under scrutiny on appeal. As no record has yet been made before the district court by defense counsel as to his trial strategy, we preserve Kakal's claim for a possible postconviction proceeding. See *State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986).

In summary, we affirm Kakal's convictions, vacate his harassment sentence as void, and remand for resentencing.

CONVICTIONS AFFIRMED; SENTENCE VACATED IN PART AND REMANDED FOR RESENTENCING.

² Q. And about how many times have you been to his house? A. About like a weekend, and I go - - I'm not going to Mayo house. I'm going to my brother's house. So Monique, they come, they live in a house, and a brother, they live in an apartment, but the same yard. So I don't know Mayo. Mayo don't know me too. Mayo, if they know me, they seen me one day when they come back to jail. The fight was different, so they go to jail for two months. One to release, no call, no what. So the girlfriend come to me and talk to me and say, hey, Buk, do you have a girlfriend? And I say, yes, I'm married, but they say I broke my boyfriend. They beat me all the time. So if you don't have a girlfriend. I say, no, Monique, I'm married. So just - - I cannot - - I treat you like friend. Mayo, they try to talk to his girlfriend. His girlfriend don't want to talk to him, no contact. So the girlfriend, they come and ask me about cigarette.