IN THE COURT OF APPEALS OF IOWA

No. 7-655 / 07-0141
Filed October 12, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHAD EVERETT HALE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen (guilty plea) and Michael D. Huppert (sentencing), Judges.

Defendant appeals his sentence after he pled guilty to possession of lithium with intent to manufacture a controlled substance and escape.

REVERSED IN PART AND REMANDED WITH DIRECTIONS.

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

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, and Stephanie Cox, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Baker, JJ.

VOGEL, J.

Chad Hale appeals from his sentences imposed for possession of lithium with intent to manufacture a controlled substance and escape. Hale asserts that the district court failed to exercise its discretion in ordering the sentences to run consecutively. We agree and remand.

On August 9, 2006, Hale was arrested for a probation violation when officers noticed a modified propane tank in his vehicle. A search later that day revealed the presence of anhydrous ammonia in the tank, lithium battery shells, a sludge that tested positive for pseudoephedrine, and muriatic acid. On September 15, 2006, Hale was charged with possession of lithium with the intent to manufacture a controlled substance, possession of ephedrine or pseudoephedrine with the intent to manufacture a controlled substance, and possession of anhydrous ammonia with the intent to manufacture a controlled substance. Hale was being held for the probation violation and pending charges when he escaped from custody while being transported by a Polk County Sheriff's Deputy. He was apprehended the following day and was later charged with escape. On November 27, 2006, Hale pled guilty to possession of lithium with intent to manufacture a controlled substance in violation of Iowa Code section 124.401(4) (2005) and escape in violation of Iowa Code section 719.4. The district court sentenced Hale to five years in prison on each conviction and ordered these terms to run consecutively.

Our review of a sentence imposed in a criminal case is for correction of errors at law. Iowa R. App. P. 6.4; *State v. Sandifer*, 570 N.W.2d 256, 257 (Iowa Ct. App. 1997). A sentence will not be disturbed on appeal unless the defendant

shows an abuse of the district court's discretion or a defect in the sentencing procedure. *Sandifer*, 570 N.W.2d at 257 (citing *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995)). "Sentencing decisions of a district court are cloaked with a strong presumption in their favor." *Loyd*, 530 N.W.2d at 713 (citing *State v. Johnson*, 513 N.W.2d 717, 719 (Iowa 1994)). An abuse of discretion will not be found unless the defendant shows that such discretion was exercised on clearly untenable grounds, for clearly untenable reasons, or to a clearly unreasonable extent. *Id.* (citing *Johnson*, 513 N.W.2d at 719). Moreover, the district court must exercise its discretion in determining what sentence to impose when a sentence is not mandatory. *Sandifer*, 570 N.W.2d at 713 (citing *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996)). Failure to exercise that discretion calls for a vacation of the sentence and a remand for resentencing. *State v. Ayers*, 590 N.W.2d 25, 27 (Iowa 1999) (citing *State v. Lee*, 561 N.W.2d 353, 354 (Iowa 1997) (holding "[w]here a court fails to exercise the discretion granted to it by law because it erroneously believes it has no discretion, a remand for resentencing is required")).

Hale argues the district court did not exercise its discretion because it believed consecutive terms were required under section 901.8:

> If a person is sentenced for two or more separate offenses, the sentencing judge may order the second or further sentence to begin at the expiration of the first or succeeding sentence. If a person is sentenced for escape under section 719.4 . . . the sentencing judge shall order the sentence to begin at the expiration of any existing sentence.

In this case, the probation violation that Hale was being held for at the time of his escape was for an existing sentence. *See State v. Jones*, 299 N.W.2d 679, 682

(Iowa 1980) (discussing that a defendant, who was paroled and returned to prison for a parole violation, was serving an existing sentence for the sentence he was under when he committed the parole violation). Moreover, the sentence for possession of lithium had not been imposed when Hale escaped from custody, and was therefore not an existing sentence at the time of his escape. *See id.* (defining an existing sentence as "any sentence the inmate was under at the time he committed an escape or committed a crime while confined"). Therefore, the district court had discretion to have the sentences for the possession of lithium and escape convictions either run consecutive or concurrent to the other. *See State v. Hogge*, 420 N.W.2d 458, 459 (Iowa 1998) (stating the district court has authority and discretion to order sentences to run consecutively (citing *Jones*, 299 N.W.2d at 682-83)).

We find that the record is clear the district court was under the erroneous belief that the sentences for possession of lithium and escape were required by statute to run consecutively. During the plea proceeding, the district court advised Hale that "the escape has to be consecutive to the other charge" and if he was sentenced to prison it would be for ten years because the court "wouldn't have any choice." During the sentencing proceeding the court stated: "Those sentences shall run consecutively to each other as statutorily required on the escape charge and also due to the separate and serious nature of those offenses." Furthermore, the State concedes that the district court, defendant's counsel, and the prosecutor were all mistaken in their belief that consecutive sentences were statutorily required under section 901.8.

Nonetheless, the State argues that the district court did not err in ordering Hale's sentences to be served consecutively because the court stated it was imposing consecutive sentences for the additional reason of "the separate and serious nature of those offenses." The State therefore contends the district court would make the same sentencing decision if we were to remand the case. Given the fact that the district court gave two reasons for imposing consecutive sentences, one of those reasons erroneous, we will not speculate as to the weight given to either. *See State v. Messer*, 306 N.W.2d 731, 733 (Iowa 1981) ("[W]e cannot speculate about the weight [the] trial court mentally assigned this factor.").

Because the district court carefully explained its decision to impose terms of incarceration rather than probation, we reverse only the portion of the sentences ordering the possession of lithium and escape convictions to run consecutively. We remand to allow the district court to exercise its discretion in determining whether the sentences should run consecutive or concurrent.

REVERSED IN PART AND REMANDED WITH DIRECTIONS.