

IN THE COURT OF APPEALS OF IOWA

No. 7-710 / 07-0299
Filed November 29, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

AVERY EUGENE WHITE,
Defendant-Appellant.

Appeal from the Iowa District Court for Tama County, Thomas L. Koehler,
Judge.

Defendant appeals his sentence and guilty plea to assault with intent to
commit sex abuse without causing injury. **NUNC PRO TUNC ORDER**
VACATED AND REMANDED.

James C. Ellefson of Moore, McKibben, Goodman, Lorenz & Ellefson law
firm, Marshalltown, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney
General, and Brent D. Heeren, County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

SACKETT, C.J.

The defendant, Avery Eugene White, pleaded guilty to assault with intent to commit sex abuse without causing injury, in violation of Iowa Code section 709.11 (2005). The court first sentenced the defendant to a term of imprisonment not to exceed two years. After learning of another mandatory sentence applicable to the defendant, the court added another term of imprisonment by a nunc pro tunc order. The defendant appeals arguing the added sentence was illegally imposed and his counsel was ineffective for failing to file a motion in arrest of judgment.

BACKGROUND.

On November 28, 2006, the defendant was charged with assault with intent to commit sexual abuse causing injury, domestic abuse assault, and failure to comply with sex offender registry requirements, first offense. On January 25, 2007, the defendant pleaded guilty to assault with intent to commit sex abuse without causing injury. That day, the defendant was sentenced to an indeterminate prison term not to exceed two years. The defendant was also ordered to pay a fine, surcharges, restitution, and costs. On January 30, the department of corrections asked the court whether the defendant was required to serve a statutory special sentence under Iowa Code section 903B.2 (2007) in addition to the sentence ordered by the court. On February 14, 2007 the court filed a nunc pro tunc order modifying the defendant's sentence to include an additional term of ten years of imprisonment with eligibility for parole to be served consecutive to the original sentence. This additional sentence was required by Iowa Code section 903B.2.

The defendant appeals contending (1) the district court imposed an illegal sentence by modifying the sentence with a nunc pro tunc order, and (2) defense counsel was ineffective in failing to file a motion in arrest of judgment to preserve error for appeal of defendant's guilty plea.

STANDARD OF REVIEW.

Sentences in criminal cases are reviewed for correction of errors at law. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). Alleged constitutional violations, including ineffective assistance of counsel claims, are reviewed de novo. *Osborn v. State*, 703 N.W.2d 917, 920 (Iowa 1998). Under this review, we evaluate the issues anew considering the totality of the circumstances. *Id.*

NUNC PRO TUNC ORDER.

The defendant's first claim concerns whether the district court could add to the defendant's sentence by issuing a nunc pro tunc order. Nunc pro tunc orders are used to correct clerical errors and cannot be used to correct flawed judicial reasoning or mistakes of law. *State v. Naujoks*, 637 N.W.2d 101, 113 (Iowa 2001). The Iowa Rules of Criminal Procedure provide two methods to correct errors in sentencing orders. First, "[c]lerical mistakes . . . arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders." Iowa R. Crim. P. 2.23(3)(g). The second method provides that, "[t]he court may correct an illegal sentence at any time." Iowa R. Crim. P. 2.24(5)(b). Illegal sentences are not considered clerical errors. See *State v. Suchanek*, 326 N.W.2d 263, 265 (Iowa 1982) (explaining that rule 2.23(3)(g) is intended to permit clerical corrections, not correction of illegal sentences). Illegal sentences are corrected by vacating the original sentence

and entering a new sentence. *Id.* at 266. If a sentence does not comply with statutory requirements, it is illegal. *State v. Draper*, 457 N.W.2d 600, 605-06 (Iowa 1990).

The defendant pleaded guilty to assault with intent to commit sex abuse without causing injury in violation of Iowa Code section 709.11. Under this section “[t]he person is guilty of an aggravated misdemeanor if no injury results.” Iowa Code § 709.11. One statute imposes an additional special sentence on anyone convicted of a misdemeanor in chapter 709. The relevant part of this statute provides:

A person convicted of a misdemeanor . . . offense under chapter 709 . . . shall also be sentenced, in addition to any other punishment provided by law, to a special sentence committing the person into the custody of the director of the Iowa department of corrections for a period of ten years, with eligibility for parole as provided in chapter 906. The special sentence imposed under this section shall commence upon completion of the sentence imposed under any applicable criminal sentencing provisions for the underlying criminal offense and the person shall begin the sentence under supervision as if on parole.

Iowa Code § 903B.2. This statute expressly requires a special sentence for misdemeanors under chapter 709. The defendant’s original sentence was illegal because it did not comply with statutory requirements. The judge’s nunc pro tunc order adding the special sentence under Iowa Code section 903B.2 was improper. The appropriate method of correcting an illegal sentence is to vacate the original sentence and enter a correct one. We therefore vacate the nunc pro tunc order and remand for resentencing.

INEFFECTIVE ASSISTANCE OF COUNSEL.

Defendant wishes to set aside his guilty plea because he was unaware of the statutory special sentence. However, his failure to file a motion in arrest of

judgment precludes his right to challenge his guilty plea. Iowa R. Crim. P. 2.24(3)(a). However, a guilty plea can be set aside without filing a motion in arrest of judgment if the error was due to ineffective assistance of counsel. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). This claim requires the defendant to prove “(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom.” *State v. Wemark*, 602 N.W.2d 810, 814 (Iowa 1999). We prefer to resolve ineffective assistance of counsel claims for postconviction relief so the record may be developed and the attorney in question may respond to the allegations. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). Because we find the record is insufficient to address this claim, we preserve it for postconviction relief proceedings.

NUNC PRO TUNC ORDER VACATED AND REMANDED.