

IN THE COURT OF APPEALS OF IOWA

No. 8-185 / 07-1395
Filed April 9, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CRAIG RICHARD OLSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Colin J. Witt, District Associate Judge.

Defendant appeals his sentence after he pled guilty to two counts of driving while barred. **SENTENCE VACATED; CASE REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Jason B. Shaw, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and David Porter, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

MAHAN, P.J.**I. Background Facts and Prior Proceedings**

On June 27, 2007, Craig Richard Olson entered written guilty pleas to two separate charges of driving while barred. The language contained in the written pleas indicated the State would recommend the sentences for the two counts run concurrent to one another and the State would dismiss a companion simple misdemeanor and a separate pending charge. At the sentencing hearing the State made the above recommendations and also recommended Olson be incarcerated for two years, concurrently, with all time suspended except for 360 days in the Polk County Jail. Olson's attorney recommended concurrent thirty-day jail sentences for both charges.

The court sentenced Olson to concurrent sentences of 150 days in the Polk County Jail and sentenced him to formal probation once he was released from jail. The court also imposed a \$625 fine on each driving while barred conviction, ordered him to complete a license under suspension class, and dismissed the other two charges.

Olson raises two issues on appeal. First, he claims the district court entered an illegal sentence when it sentenced him to a determinate term of 150 days in jail and placed him on probation. Second, he claims his trial counsel was ineffective because he did not object to the State's recommendation of concurrent sentences of 360 days in jail. The record contains no written plea agreement, but Olson claims he appeared for sentencing expecting the State to make a recommendation for concurrent two-year prison sentences. Therefore,

he claims his counsel should have objected to the State's alleged breach of the plea agreement.

II. Standard of Review

Our review of claims of an illegal sentence is for correction of errors at law. *State v. Maxwell*, 743 N.W.2d 185, 190 (Iowa 2008). We review claims of ineffective assistance of counsel de novo. *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005).

III. Merits

The State concedes the sentence imposed by the district court was improper. As noted by our supreme court, "probation is to be served in lieu of, not in addition to, incarceration. Probation cannot be ordered in the absence of a suspension of sentence, a deferral of sentence, or a deferral of judgment." *State v. Stephenson*, 608 N.W.2d 778, 784 (Iowa 2000). There is no statutory authority authorizing the sentence imposed in this case, and there was no deferral of judgment or deferral of sentence. The court imposed a determinate term of 150 days on each count and specifically refrained from suspending any part of that sentence. Accordingly, we conclude the term of probation following the period of confinement represents an illegal split sentence. *See id.*; *see also State v. Tensley*, 334 N.W.2d 764, 765-65 (Iowa 1983). Therefore we must vacate the defendant's sentence and remand to the district court for resentencing. Upon remand, the district court shall also resolve the claim as to the details of the plea agreement.

SENTENCE VACATED; CASE REMANDED FOR RESENTENCING.