IN THE COURT OF APPEALS OF IOWA

No. 8-568 / 07-1782
Filed August 27, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JERRY MARTIC MCKNIGHT,
Defendant-Appellant.

Appeal from the Iowa District Court for Floyd County, Colleen D. Weiland, Judge.

Defendant appeals his sentences for burglary and assault. **REVERSED; SENTENCING ORDER PARTIALLY VACATED AND REMANDED.**

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

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, and Jesse Marzen, County Attorney, for appellee.

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

EISENHAUER, J.

After plea negotiations, on September 5, 2007, McKnight pled guilty to third-degree burglary and to assault causing injury in violation of Iowa Code sections 713.1, 713.6A, 708.1(1) and 708.2(2) (2007). McKnight appeals his October 8, 2007 sentences. We review sentencing orders for correction of errors at law and will not overturn sentencing orders absent an abuse of discretion. *State v. Liddell*, 672 N.W.2d 805, 815 (Iowa 2003).

On the burglary conviction, McKnight was sentenced to an indeterminate, five-year term of incarceration with a fine. The incarceration and fine were suspended and McKnight was placed on five years probation which required residence at a substance abuse facility "for 180 days or until maximum benefits are received." On McKnight's assault conviction, he was sentenced to six months in the county jail and fined. The court explained:

> That sentence is not suspended in regard to [assault], and so there will be some arrangement between your probation [for burglary], and in serving the sentence [for assault]. And for whatever needs to happen for the paperwork, it will deem to be served consecutively because I think that logistically that's the way it has to be written. So your probation for [burglary] won't start until you're done with your time [for assault].

The court ruled McKnight would not receive credit for time served.

McKnight argues, and the State agrees, the district court erred in refusing to give him credit for the time he spent in the county jail after his arrest for burglary. We find the court abused its discretion because credit is mandated by Iowa Code section 903A.5:

> If an inmate was confined to a county jail . . . at any time prior to sentencing, or after sentencing but prior to the case having been

> decided on appeal . . . the inmate shall be given credit for the days already served upon the term of the sentence.

McKnight is entitled to credit for the time he served after his burglary arrest. *See* Iowa R. Crim. P. 2.26(1)(f) (stating "defendant shall receive full credit for time spent in custody on account of the offense for which the defendant is convicted"). Because the 903A.5 credit includes post-sentence confinement, the calculation is performed by the sheriff and follows a court's oral sentence and accompanying written judgment entry. *State v. Hawk*, 616 N.W.2d 527, 529 (Iowa 2000). We therefore vacate the portion of the sentencing order denying credit for time served and remand for a corrected order omitting any reference to credit for time served. *See id*. (holding judges' inclusion of a "statement that credit for time served will be allowed" is "essentially immaterial;" the key concern is proper credit being "calculated pursuant to statute").

Second, McKnight argues the district court abused its discretion when it ordered his burglary probation to run consecutively to his assault jail sentence. McKnight claims the court ran the sentences consecutively because it incorrectly believed it lacked discretion to use concurrent sentences and was required to use consecutive sentences for logistical purposes. McKnight relies on the court's statement: "And for whatever needs to happen for the paperwork, it will deem to be served consecutively because I think that logistically that's the way it has to be written."

The State argues the court intended to communicate, by use of the above-quoted language in context, the

> court's conclusion that, in light of the fact that [McKnight] had seven assault convictions in the short period of two years, his inability to

> refrain from further violations, and his evident substance abuse problem, the court could not as a matter of sound sentencing practice make his sentences concurrent.

While the court may have intended to communicate this conclusion in explaining its pronouncement of consecutive sentences, it did not do so. We do not find an appropriate exercise of discretion when the language utilized indicates the court was unaware it had the discretion to order concurrent sentences for the burglary probation and the assault jail sentence. *See State v. Ayers*, 590 N.W.2d 25, 32 (Iowa 1999). "Where a court fails to exercise the discretion granted it by law because it erroneously believes it has no discretion, a remand for resentencing is required." *State v. Lee*, 561 N.W.2d 353, 354 (Iowa 1997). Accordingly, we remand for resentencing limited to the issue of whether McKnight's burglary and assault sentences should run concurrently or consecutively. *See id*. (holding court may remand only invalid portion of sentence).

REVERSED; SENTENCING ORDER PARTIALLY VACATED AND REMANDED.