

IN THE COURT OF APPEALS OF IOWA

No. 9-237 / 08-1385
Filed May 6, 2009

STATE OF IOWA,
Plaintiff-Appellant,

vs.

**IOWA DISTRICT COURT FOR
POLK COUNTY,**
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson,
Judge.

The State petitioned for writ of certiorari contending the district court had no authority to suspend the sentence for defendant, Jonathan Murray, under Iowa Code section 901.10(1) (2007). **WRIT SUSTAINED AND REMANDED.**

Thomas J. Miller, Attorney General, Mary Tabor and Kyle Hanson, Assistant Attorneys General, John P. Sarcone, County Attorney, and Michael Hunter, Assistant County Attorney, for appellant.

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellee.

Considered by Sackett, C.J., and Potterfield and Mansfield, JJ.

SACKETT, C.J.

Jonathan Murray pleaded guilty to theft in the first degree in violation of Iowa Code sections 714.1 and 714.2(1) (2007), and assault while participating in a felony in violation of Iowa Code sections 708.1 and 708.3. At sentencing, the district court determined it had discretion under Iowa Code section 901.10(1) to order a reduced sentence. It suspended both terms of imprisonment and ordered Murray to be placed on probation for two years. The State filed a petition for writ of certiorari contending the district court misapplied section 901.10(1) and was without authority to suspend Murray's term of imprisonment for assault while participating in a felony.

SCOPE OF REVIEW. A writ of certiorari is granted when a tribunal has exceeded its proper jurisdiction or otherwise acted illegally. Iowa R. Civ. P. 1.1401; *Alons v. Iowa Dist. Ct.*, 698 N.W.2d 863, 863 (Iowa 2005). A sentence not authorized by statute is illegal and we can sustain a writ on this basis. See *State v. Iowa Dist. Ct.*, 630 N.W.2d 778, 782 (Iowa 2001). The State claims the district court misinterpreted a statute and therefore our review is for correction of errors at law. *State v. Iowa Dist. Ct.*, 730 N.W.2d 677, 679 (Iowa 2007); *State v. Iowa Dist. Ct.*, 630 N.W.2d 838, 840 (Iowa 2001).

MERITS. Where no serious injury results, assault while participating in a felony is a class D felony. Iowa Code § 708.3. When entering a judgment for the conviction of a class D felony,

the court, in imposing a sentence of confinement, shall commit the person . . . for an indeterminate term, the maximum length of which shall not exceed the limits as fixed by section 902.9, unless

otherwise prescribed by statute, nor shall the term be less than the minimum term imposed by law, if a minimum sentence is provided.

Id. § 902.3. The maximum indeterminate term of confinement for class D felony convictions is five years. *Id.* § 902.9(5).¹

Assault while participating in a felony is also a forcible felony. The list of forcible felonies, located at Iowa Code section 702.11(1), includes “any felonious . . . assault.” *Id.* § 702.11(1); see *State v. Washington*, 356 N.W.2d 192, 197 (Iowa 1984). “We have interpreted the phrase ‘any felonious assault’ to mean any assault the commission of which constitutes a felony.” *State v. Iowa Dist. Ct.*, 308 N.W.2d 27, 29 (Iowa 1981); see also *State v. Long*, 490 N.W.2d 52, 52 (Iowa 1992). Defendants convicted of a forcible felony are ineligible for a deferred judgment, deferred sentence, or suspended sentence. Iowa Code § 907.3; *State v. Ohnmacht*, 342 N.W.2d 838, 842 (Iowa 1983). The court must impose some period of confinement in the sentence. *State v. Peterson*, 327 N.W.2d 735, 736 (Iowa 1982) (stating that class D forcible felons must be sentenced to confinement). Murray appears to concede that the district court did not have discretion to suspend his maximum indeterminate term of five years in imprisonment since he was convicted of a forcible felony.

Murray argues, however, the court had discretion under 901.10(1) to reduce any mandatory minimum sentence of five years that might apply because one of Murray’s accomplices used a weapon during the crime. The district court

¹ Iowa Code section 902.9(5) provides:

A class “D” felon, not an habitual offender, shall be confined for no more than five years, and in addition shall be sentenced to a fine of at least seven hundred fifty dollars but not more than seven thousand five hundred dollars.

relied on section 901.10(1) in *suspending* Murray's sentence. This statute provides in relevant part,

901.10 *Reduction* of sentences.

1. A court sentencing a person for the person's first conviction under section . . . 902.7 may, at its discretion, sentence the person to a term less than provided by the statute if mitigating circumstances exist and those circumstances are stated specifically in the record.

Iowa Code § 901.10(1) (emphasis supplied). Section 902.7 requires the imposition of a mandatory minimum sentence for defendants who possess, display, or are armed with a dangerous weapon while they commit a forcible felony. See Iowa Code § 902.7.² Although Murray was never alleged to have used a weapon during the crime, one of his accomplices purportedly used a gun during the incident. Murray reasons that since he was subject to section 902.7 as an aider and abettor, the court's discretion to reduce his mandatory minimum sentence under 901.10(1) was triggered.

We first note that section 901.10 permits reduction of sentences, not suspension. Suspension of sentences is governed by section 907.3. Section 901.10(1) states that a court "may, at its discretion, *sentence the person to a*

² Iowa Code section 902.7 provides,

At the trial of a person charged with participating in a forcible felony, if the trier of fact finds beyond a reasonable doubt that the person is guilty of a forcible felony and that the person represented that the person was in the immediate possession and control of a dangerous weapon, displayed a dangerous weapon in a threatening manner, or was armed with a dangerous weapon while participating in the forcible felony the convicted person *shall serve a minimum of five years* of the sentence imposed by law. A person sentenced pursuant to this section shall not be eligible for parole until the person has served the minimum sentence of confinement imposed by this section.

(emphasis supplied).

term less than provided by the statute” but does not state that the term may be suspended altogether. Furthermore, this section allows a court to reduce any applicable *mandatory minimum sentence* required by section 902.7, but “[i]t does not permit the court to lessen *the indeterminate sentence* imposed by law.” *State v. Iowa Dist. Ct.*, 630 N.W.2d at 782 (emphasis supplied). Therefore, if section 902.7 was implicated by Murray’s crime, the sentencing court could only use discretion under section 901.10(1) to reduce the mandatory minimum required in section 902.7. Section 901.10(1) would not allow the sentencing court to suspend or reduce the maximum indeterminate term of five years confinement required under section 902.9(5) for Murray’s conviction of assault while participating in a felony.

In this situation, the State did not urge that Murray be subject to the mandatory minimum required in section 902.7. When the State intends to apply the sentencing enhancement of section 902.7, certain requirements must be followed. See Iowa Rs. Crim. P. 2.6(6), 2.22(2). Even if Murray could have been, he was not subject to the mandatory minimum sentence of section 902.7. The discretion authorized in section 901.10(1) plainly did not apply to Murray’s maximum indeterminate term. Furthermore, since the mandatory minimum sentence of section 902.7 was not applied to Murray, the court could not invoke discretion under section 901.10(1) to reduce or suspend Murray’s sentence. We therefore sustain the State’s petition for writ of certiorari, vacate the sentence, and remand to the district court for resentencing.

WRIT SUSTAINED AND REMANDED.