

IN THE COURT OF APPEALS OF IOWA

No. 9-271 / 08-0883
Filed May 6, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT FRANK GUTKNECHT,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Joseph Moothart, District Associate Judge.

Robert Gutknecht challenges the district court's ruling amending its sentencing order to impose Iowa Code section 903B.2, a special sentencing provision for misdemeanor sex offenders. **AFFIRMED.**

Robert Gutknecht, Reinbeck, pro see appellant.

Robert W. Thompson of Thompson Law Office, Reinbeck, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Linda Fangman, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.**I. Background Facts and Proceedings**

Robert Gutknecht was charged with five violations of invasion of privacy in violation of Iowa Code section 709.21 (2007) and criminal mischief in the fourth degree in violation of Iowa Code section 716.1. Gutknecht pleaded guilty pursuant to a plea agreement with the State. On July 30, 2007, after a hearing on acceptance of the guilty plea, the district court entered sentencing in accordance with the terms of the plea agreement, sentencing Gutknecht to one year in jail with all but two days suspended for each count of invasion of privacy. The sentence also included a self-probation period of one year. By letter dated February 13, 2008, the Department of Correctional Services informed the district court that its sentencing order did not contain language regarding a mandatory special sentence prescribed by Iowa Code section 903B.2. After a hearing on the issue, the district court issued a ruling correcting the original sentence to include an additional ten years of probation as required by section 903B.2. Gutknecht appeals from the corrected sentence, arguing it violates his right to due process.

II. Standard of Review

We review sentences imposed in criminal cases for errors at law. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). To the extent Gutknecht alleges a violation of constitutional rights, our review is de novo. *State v. Decker*, 744 N.W.2d 346 (Iowa 2008).

III. Sentencing

Gutknecht argues that the original sentence imposed by the district court was legal and must stand. Iowa Code section 903B.2 imposes a mandatory special sentence. See *State v. Bearse*, 748 N.W.2d 211, 218 (Iowa 2008) (finding use of the word “shall” indicates that the sentence is mandatory). The district court is required to impose the sentence prescribed by statute. *State v. Ohnmacht*, 342 N.W.2d 838, 842-43 (Iowa 1983). A sentence not authorized by statute is an illegal sentence. *State v. Draper*, 457 N.W.2d 600, 605 (Iowa 1990). “[A]n illegal sentence is a nullity subject to correction, even though correction may result in an increase in the sentence on remand.” *Id.* at 606. Because the district court originally failed to impose the mandatory special sentence, that sentence was illegal and cannot stand.

Gutknecht also claims that his guilty plea was not entered knowingly and voluntarily because the district court failed to inform him of the maximum possible punishment. Iowa Rule of Criminal Procedure 2.8(2)(b)(2) requires that the court inform the defendant of the maximum possible punishment provided by statute. The court’s failure to comply with this rule renders Gutknecht’s plea involuntary. *State v. Kress*, 636 N.W.2d 12, 21 (Iowa 2001). Due process requires that a defendant’s guilty plea be entered voluntarily and knowingly. *State v. Boone*, 298 N.W.2d 335, 337 (Iowa 1980).

Iowa Rule of Criminal Procedure 2.24(3)(a) requires that Gutknecht file a motion in arrest of judgment in order to challenge the adequacy of his guilty plea on appeal. *Kress*, 636 N.W.2d at 19. A motion in arrest of judgment must be made not later than five days before sentencing. Iowa R. Crim. P. 2.24(3)(b).

Gutknecht waived his right to file a motion in arrest of judgment when he agreed to be sentenced the same day the court accepted his guilty plea. The district court explained to Gutknecht that immediate sentencing would result in his inability to challenge his guilty plea due to his failure to file a motion in arrest of judgment. The colloquy between the district court and Gutknecht indicates that Gutknecht understood he was giving up his right to challenge his guilty plea.

Gutknecht's failure to file a motion in arrest of judgment precludes him from challenging his guilty plea on appeal. See Iowa R. Crim. P. 2.24(3)(a). "However, the failure to file a motion in arrest of judgment will not preclude the claim if the failure was the result of ineffective assistance of counsel." *State v. Hallock*, ___ N.W.2d ___ (Iowa Ct. App. 2009).

When a defendant claims a plea was not made knowingly and voluntarily because the court failed to disclose the maximum penalty, but the defendant failed to file a motion in arrest of judgment, we have decided the proper remedy is for the defendant to raise this issue on postconviction relief.

State v. Smith, 753 N.W.2d 562, 564 (Iowa 2008). We find that the appropriate remedy is for Gutknecht to bring a postconviction challenge to his guilty plea.

AFFIRMED.