

IN THE COURT OF APPEALS OF IOWA

No. 9-289 / 08-1470
Filed May 29, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

YOEKE DOSSOUVI,
Defendant-Appellant.

Appeal from the Iowa District Court for Muscatine County, John A. Nahra (plea) and Charles H. Pelton (sentencing), Judges.

Defendant appeals from his guilty plea and sentence for lascivious acts with a child. **ORDER MODIFYING SENTENCE VACATED; SENTENCE VACATED; AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Michael J. Walton, County Attorney, and Julie Walton, Assistant County Attorney, for appellee.

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

DOYLE, J.

Yoeke Dossouvi¹ appeals from his guilty plea and sentence for lascivious acts with a child in violation of Iowa Code section 709.8(3) (2007). He claims the district court erred in modifying his “illegally lenient” sentence in a nunc pro tunc order entered after he filed his notice of appeal. We agree.

On April 28, 2008, Dossouvi pleaded guilty to lascivious acts with a twelve-year-old child. He filed a motion in arrest of judgment on September 3, which was considered at his sentencing hearing the following day. The district court denied Dossouvi’s motion at that hearing and sentenced him to an indeterminate prison term not to exceed five years. He was also ordered to pay a fine, court costs, surcharges, and restitution.

Dossouvi filed a notice of appeal on September 11, 2008, at 11:37 a.m. Later that day, a “re-sentencing” hearing was held concerning the district court’s failure to impose the special sentence set forth in Iowa Code section 903B.2 in its original sentencing order. After being informed by the parties that there was no “legal reason . . . why [it] should not correct the sentence,” the court modified Dossouvi’s sentence to include a “special sentence for this Class D felony offense of commitment 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” as required by section 903B.2. Dossouvi appeals.

¹ We note the record and briefs are in conflict as to the correct spelling of the defendant’s last name. It is at times spelled as “Dossauvi” in the district court proceedings, but it appears from his brief the correct spelling is “Dossouvi.” We will therefore use that spelling in our opinion.

“Our review of a sentence imposed in a criminal case is for correction of errors at law.” *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). “We will not reverse the decision of the district court absent an abuse of discretion or some defect in the sentencing procedure.” *Id.* “Questions of jurisdiction are also reviewed for correction of errors at law.” *Id.*

Dossouvi first claims the district court did not have jurisdiction to modify his sentence after he filed his notice of appeal. “Generally, an appeal divests a district court of jurisdiction.” *State v. Mallett*, 677 N.W.2d 775, 776 (Iowa 2004). The State does not rely on any exceptions to the above-stated rule in asserting that the district court’s order modifying Dossouvi’s sentence should be affirmed. See *State v. Valin*, 724 N.W.2d 440, 442 n.1 (Iowa 2006) (discussing exceptions to the jurisdictional rule). It instead argues that regardless of whether the district court was divested of jurisdiction, the order adding the special sentence in section 903B.2 after Dossouvi filed his notice of appeal was “‘correct and error, if any’ therefore did not prejudice any rights of the appellant.” We do not agree.

Iowa Code section 903B.2 states that an offender such as Dossouvi “shall also be sentenced . . . to a special sentence . . . for a period of ten years . . . as if on parole.” See *State v. Wade*, 757 N.W.2d 618, 628 (Iowa 2008) (describing the sentence prescribed by section 903B.2 as “mandatory” and “automatic”). Dossouvi’s original sentence did not include the special sentence set forth in section 903B.2. If a sentence does not comply with statutory requirements, it is illegal. *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.

Iowa Rule of Criminal Procedure 2.24(5)(a) provides that “[t]he court may correct an illegal sentence at any time.” However, the proper procedure for correcting an illegal sentence is to vacate the original sentence and enter a new one. See *State v. Suchanek*, 326 N.W.2d 263, 265 (Iowa 1982) (“[T]he imposition of a sentence that is not permitted by statute is an illegal sentence, and such sentence is void and must be vacated.”). The district court did not follow that procedure here. Instead, it attempted to correct the error in Dossouvi’s original sentence with a calendar entry order adding the section 903B.2 special sentence after a hearing on the issue. See *id.* (stating nunc pro tunc orders are used to correct clerical mistakes not illegal sentences).

Nevertheless, as Dossouvi claims, the original sentence entered by the court is illegal and subject to correction because it does not comport with section 903B.2. See *Draper*, 457 N.W.2d at 605 (“[W]hen a sentencing court departs—upward or downward—from the legislatively authorized sentence for a given offense, the pronounced sentence is a nullity subject to correction, on direct appeal or later.”). We therefore vacate the district court’s calendar entry order, which was entered after Dossouvi filed his notice of appeal, as well as the original illegal sentence for lascivious acts with a child, and remand for resentencing.

**ORDER MODIFYING SENTENCE VACATED; SENTENCE VACATED;
AND REMANDED FOR RESENTENCING.**