

SUPREME COURT OF NEBRASKA

State v. Huston

298 Neb. 323 (2017) · No. No. S-17-267 · Decided December 1, 2017

SUMMARY

The Nebraska Supreme Court held that an amendment to Neb. Rev. Stat. § 60-4,108, which made driver's-license revocation discretionary for certain first-offense driving-during-revocation defendants placed on probation, applied retroactively because it mitigated punishment and took effect before final judgment. The court vacated Brianna L. Huston's sentence in its entirety and remanded for resentencing under the amended statute.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Kelch, J.; Heavican, C.J.; Miller-Lerman, J.; Cassel, J.; Stacy, J.; Funke, J.
JURISDICTION	Nebraska
DECIDED	December 1, 2017
DOCKET	No. S-17-267
DISPOSITION	vacated
PROCEDURAL POSTURE	Huston pleaded guilty in the Hall County Court to first-offense driving during revocation and was sentenced to jail, probation, and a one-year driver's-license revocation. The Hall County District Court affirmed. The Nebraska Supreme Court reviewed the sentence while an amendment mitigating the license-revocation punishment took effect.
STANDARD OF REVIEW	A sentence within statutory limits will not be disturbed absent an abuse of discretion by the trial court. The court also reviewed the retroactivity issue as a question of law and addressed plain error.
PRECEDENTIAL VALUE	Published Nebraska Supreme Court opinion; precedential.
PARTIES	Brianna L. Huston v. State of Nebraska

TOPICS

- sentencing
- statutory interpretation
- criminal procedure
- appellate procedure
- standard of review

PRACTICE AREAS

criminal law

criminal procedure

sentencing

appellate practice

QUESTIONS PRESENTED

1. Whether the 2017 amendment to Neb. Rev. Stat. § 60-4,108, which mitigated the punishment for first-offense driving during revocation by allowing discretion concerning license revocation for offenders placed on probation, applied retroactively to Huston's sentence.
2. Whether the county court's failure to exercise discretion concerning license revocation required vacatur and resentencing.
3. Whether the court needed to reach Huston's additional assignment of error concerning when the revocation should begin.

HOLDINGS

1. When a criminal statute is amended to mitigate punishment after the offense but before final judgment, the amended punishment applies unless the Legislature provides otherwise. Because the amendment to § 60-4,108 took effect before final judgment and mitigated Huston's punishment, it applied retroactively to her sentence.
2. Because the county court believed the former law required a one-year license revocation, it failed to exercise the discretion required by the amended statute. That failure constituted plain error entitling Huston to retroactive relief and resentencing.
3. The court was not required to analyze Huston's additional challenge concerning when the revocation should begin because retroactive application of the amended statute independently required vacatur and resentencing.

KEY QUOTATIONS

“Accordingly, the amended version of § 60-4,108 allows for a more lenient punishment, i.e., mitigates the punishment, and therefore it applies retroactively to Huston’s sentence.” (327)

“Because the county court was unable to exercise its discretion at the time of Huston’s sentencing, we vacate Huston’s sentence in its entirety and remand the cause to the district court with directions to remand it to the county court for resentencing consistent with the amended version of § 60-4,108.” (328)

FACTUAL BACKGROUND

Huston was charged with driving during revocation and pleaded guilty to an amended first-offense charge in November 2016. The county court sentenced her to 45 days in jail, six months' probation, and a one-year driver's-license revocation, believing that *State v. Frederick* required the revocation. While her sentence appeal was pending, Nebraska amended Neb. Rev. Stat. § 60-4,108 to permit discretion rather than require revocation when a first-time offender is placed on probation.

PROCEDURAL HISTORY

Huston was initially charged with second- or third-offense driving during revocation and later pleaded guilty to an amended first-offense charge. The county court imposed 45 days' imprisonment, six months' probation, and a one-year license revocation, concluding that revocation was mandatory under *State v. Frederick*. The district court affirmed the sentencing order. While Huston's appeal was pending, Legislative Bill 263 amended the governing statute to give sentencing courts discretion to order revocation when an offender is placed on probation. The Nebraska Supreme Court vacated the sentence and remanded for resentencing under the amended statute.

DISPOSITION

vacated

REMAND INSTRUCTIONS

Vacate Huston's sentence in its entirety and remand to the Hall County District Court with directions to remand the cause to the Hall County Court for resentencing consistent with the amended version of Neb. Rev. Stat. § 60-4,108. On resentencing, the county court must exercise discretion concerning whether to impose a period of driver's-license revocation.

CASES CITED

- *State v. Frederick*, 291 Neb. 243, 864 N.W.2d 681 (2015)
- *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971)
- *State v. Duncan*, 291 Neb. 1003, 870 N.W.2d 422 (2015)
- *State v. Lantz*, 290 Neb. 757, 861 N.W.2d 728 (2015)
- *State v. Chacon*, 296 Neb. 203, 894 N.W.2d 238 (2017)
- *Doty v. West Gate Bank*, 292 Neb. 787, 874 N.W.2d 839 (2016)

OPINION

PER CURIAM.

Nebraska Supreme Court Online Library www.nebraska.gov/apps-courts-epub/ 12/01/2017 09:11 AM CST - 323 - Nebraska Supreme Court Advance Sheets 298 Nebraska Reports STATE v. HUSTON Cite as 298 Neb. 323 State of Nebraska, appellee, v. Brianna L. Huston, appellant. ____ N.W.2d ____ Filed December 1, 2017. No. S-17-267. 1. Sentences: Appeal and Error. An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.

2. Criminal Law: Statutes: Sentences: Legislature. Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise. 3. Appeal and Error. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Hall County, Mark J. Young, Judge, on appeal thereto from the County Court for Hall County, Philip M. Martin, Jr., Judge. Sentence vacated, and cause remanded with directions. Robert W. Alexander, Deputy Hall County Public Defender, for appellant. Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appellee. Heavican, C.J., Miller-Lerman, Cassel, Stacy, K elch, and Funke, JJ. - 324 - Nebraska Supreme Court Advance Sheets 298 Nebraska Reports STATE v. HUSTON Cite as 298 Neb. 323 K elch, J. NATURE OF CASE Brianna L. Huston was sentenced to jail time and probation after pleading guilty to first-offense driving during revocation.

In addition to this sentence, the county court for Hall County ordered a revocation of Huston's driver's license for 1 year, believing that such was required under this court's interpretation of Neb. Rev. Stat. § 60-4,108 (Cum. Supp. 2016) set forth in State v. Frederick.¹ On appeal, the district court for Hall County affirmed. Huston subsequently appealed the revocation portion of her sentence to this court.

While Huston's appeal was pending, 2017 Neb. Laws, L.B. 263, went into effect, which amended § 60-4,108 to allow the sentencing court discretion in ordering a revocation for first-time offenders when the offender has been placed on probation.² Because we determine that the amended version of § 60-4,108 applies retroactively to Huston's sentence, we vacate Huston's sentence in its entirety and remand the cause to the district court with directions to remand it to the county court for resentencing consistent with the amended version of § 60-4,108.

FACTS In July 2016, Huston was charged with driving during revocation, second or third offense. In November, she pled guilty to an amended charge of first-offense driving during revocation. In exchange for Huston's plea, the State agreed to a sentence of 45 days' jail time and to not oppose Huston's request for house arrest.

The county court sentenced Huston to 45 days' jail time and 6 months' probation and revoked her license for 1 year. In revoking Huston's license, the county court found that it was obligated to do so by State v. Frederick, which involved 1 State v. Frederick, 291 Neb. 243, 864 N.W.2d 681 (2015).² See 2017 Neb. Laws, L.B. 263, § 65. - 325 - Nebraska Supreme Court Advance Sheets 298 Nebraska Reports STATE v. HUSTON Cite as 298 Neb. 323 another appellant convicted of driving during revocation.³ In Frederick, we found no merit to the appellant's assignment of error and affirmed his conviction.

Although neither party assigned or argued it, we found that the sentencing court committed plain error when it failed to revoke the appellant's driver's license. We said that revocation was required by § 60-4,108(1)(a), which, at the time Frederick was issued (and at the time Huston was sentenced), stated in relevant part: [For a first offense of driving during revocation,] the court shall, as a part of the judgment of conviction, order such person not to operate any motor vehicle

for any purpose for a period of one year from the date ordered by the court and also order the operator's license of such person to be revoked for a like period....

Such [order] shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked, whichever is later. Huston appealed her sentence to the district court, which affirmed the county court's sentencing order, finding no abuse of discretion. Huston then timely appealed the district court's order in March 2017.

The parties' briefs were filed in May and June. Effective August 24, 2017, L.B. 263 amended § 60-4,108. Prior to L.B. 263, § 60-4,108(1)(a) provided that for a first offense under that section, "the court shall... order the operator's license of such person to be revoked for [a period of 1 year]." L.B. 263 added the phrase, "unless the person was placed on probation, then revocation may be ordered at the court's discretion." ASSIGNMENT OF ERROR Huston assigns that the district court erred in affirming the county court's decision to revoke her driver's license and its decision that the revocation must begin immediately.

3 See *State v. Frederick*, supra note 1. - 326 - Nebraska Supreme Court Advance Sheets 298 Nebraska Reports *STATE v. HUSTON* Cite as 298 Neb. 323 STANDARD OF REVIEW [1] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.⁴ ANALYSIS Before addressing Huston's assigned errors, we turn our attention to the State's assertion that L.B.

263 would amend § 60-4,108 and that if the change went into effect while Huston's appeal was still pending, then the amendment might affect Huston's sentence under *State v. Randolph*.⁵ [2] In *State v. Randolph*, we held that where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.⁶ But, the *Randolph* doctrine does not apply if the Legislature created a "new crime" rather than merely changing the penalty for an existing crime.⁷ Here, the amended version of § 60-4,108 changed only the punishment.

Section 60-4,108 was amended after Huston committed the offense of driving during revocation, but before final judgment. If a defendant appeals his or her sentence, the sentence is not a final judgment until the entry of a final mandate.⁸ Because we have not yet entered a final mandate on Huston's appeal of her sentence, the judgment is not yet final.

Thus, if the amendment to § 60-4,108 mitigates Huston's punishment, then Huston's punishment is that provided by the amended version of § 60-4,108, unless the Legislature has specifically provided otherwise. ⁴ *State v. Lantz*, 290 Neb. 757, 861 N.W.2d 728 (2015). ⁵ *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971). ⁶ *Id.* ⁷ See *State v. Duncan*, 291 Neb. 1003, 870 N.W.2d 422 (2015).

8 Id. - 327 - Nebraska Supreme Court Advance Sheets 298 Nebraska Reports STATE v. HUSTON Cite as 298 Neb. 323 We conclude that Huston's punishment is that provided by the amended version of § 60-4,108. The Legislature has not provided otherwise, and the amendment to § 60-4,108 mitigates the punishment for Huston's offense.

Before the amendment, under our interpretation set forth in State v. Frederick, § 60-4,108 required that a defendant convicted of first-offense driving during revocation have his or her driver's license revoked for a period of 1 year regardless of whether that defendant was placed on probation.⁹ After the amendment, if the defendant is placed on probation, revocation is not necessarily required.¹⁰ Accordingly, the amended version of § 60-4,108 allows for a more lenient punishment, i.e., mitigates the punishment, and therefore it applies retroactively to Huston's sentence.

Because it applies retroactively, then, the county court should have had discretion in deciding whether to revoke Huston's driver's license. We acknowledge that Huston's current sentence, including the revocation portion, is within the statutory limits of the past version of § 60-4,108; and even under the amended version of the statute, the county court could order a 1-year period of revocation in its discretion.

However, here, the county court was bound by the law at the time of sentencing, was required to impose a period of revocation, and was unable to exercise its discretion. As a matter of plain error, therefore, we conclude that Huston is entitled to retroactive relief under L.B. 263.¹¹ Consequently, we vacate Huston's sentence and remand the cause to the district court with directions to remand it to the county court for resentencing consistent with the amended version of § 60-4,108.

[3] Because we conclude that the amended version of § 60-4,108 applies retroactively to Huston's sentence and ⁹ See State v. Frederick, *supra* note 1. ¹⁰ See 2017 Neb. Laws, L.B. 263, § 65. ¹¹ See State v. Chacon, 296 Neb. 203, 894 N.W.2d 238 (2017). - 328 - Nebraska Supreme Court Advance Sheets 298 Nebraska Reports STATE v. HUSTON Cite as 298 Neb. 323 remand the cause for resentencing, we need not consider Huston's assignment of error.

An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.¹² CONCLUSION For the reasons set forth above, we conclude that the amended version of § 60-4,108 applies retroactively to Huston's sentence.

Under the amended version, the county court has discretion in deciding whether to impose a period of revocation. Because the county court was unable to exercise its discretion at the time of Huston's sentencing, we vacate Huston's sentence in its entirety and remand the cause to the district court with directions to remand it to the county court for resentencing consistent with the amended version of § 60-4,108.

Sentence vacated, and cause remanded with directions. Wright, J., not participating. 12 Doty v. West Gate Bank, 292 Neb. 787, 874 N.W.2d 839 (2016).

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