

IN THE DISTRICT COURT OF BOYD COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff-Appellee,

vs.

DUANE TIMOTHY KLASNA,

Defendant-Appellant.

Case No. 4678

JUDGMENT ON APPEAL

DATE OF HEARING: July 17, 2000.
DATE OF RENDITION: July 17, 2000.
DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).
TYPE OF HEARING: Oral arguments on appeal from county court.
APPEARANCES:
For appellant: Forrest F. Peetz with defendant.
For appellee: Carl Schuman, Boyd County Attorney.
SUBJECT OF ORDER: Appeal from county court (case number CR99-7).
PROCEEDINGS: At the hearing, these proceedings occurred:

The bill of exceptions, as filed with the clerk of this court, is deemed as admitted in evidence pursuant to NEB. REV. STAT. § 25-2733(2) (Reissue 1995). Arguments of counsel were heard or waived. The decision was pronounced.

OPINION:

1. The appellant appeals from the judgment and sentence of the county court upon a plea of guilty to the charge of driving under suspension.
2. Upon appeal from a county court in a criminal case, a district court acts as an intermediate appellate court, rather than as a trial court, and its review is limited to an examination of the county court record for error or abuse of discretion. *State v. Hopkins*, 7 Neb. App. 895, 587 N.W.2d 408 (1998). Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. *State v. Patterson*, 7 Neb. App. 816, 585 N.W.2d 125 (1998).
3. Appellate review is limited to those errors specifically assigned in the appeal to the district

court and again assigned as error in an appeal to a higher appellate court. *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997). Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Id.* Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Id.*

4. The appellant makes two assignments of error in the statement of errors. First, the appellant alleges that sentence was excessive. Second, the appellant asserts that period of motor vehicle operator's license revocation was excessive and in excess of statutory authority.

5. The defendant was convicted of driving during a period of suspension under NEB. REV. STAT. § 60-4,108 (Reissue 1998). That section classifies the offense as a Class III misdemeanor. Additionally, for a first offense, it requires that the court order the defendant not to operate any motor vehicle for any purpose for a period of one year upon final judgment of any appeal or review, and not to run concurrently with any jail term imposed. A Class III misdemeanor provides no statutory minimum and imposes a statutory maximum penalty of three months imprisonment or a \$500 fine or both. NEB. REV. STAT. § 28-106 (Cum. Supp. 1998).

6. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Hopkins, supra*. The power to impose a sentence for the commission of a crime against the State is entrusted to the sentencing court and not to an appellate court. *Id.* An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.* Courts are well advised to rely upon the statutory guidelines for imposing sentences. *Id.* Mitigating considerations are relevant when a sentence is appealed as excessive, but only on the question of whether the sentencing court abused its discretion and not as justification for a lesser sentence which the appellate court would have imposed. *Id.* An appellate court may not vacate a sentence of imprisonment imposed by a trial court simply because the defendant possesses redeeming qualities which might lead other trial courts, or the appellate court, to render a more lenient sentence. *Id.* An appellate court, including a district court reviewing a county court

sentence, has extremely limited review of sentences. *Id.* A defendant is not entitled to a sentence to probation as a matter of right. *State v. Swails*, 195 Neb. 406, 238 N.W.2d 246 (1976); *State v. Holiday*, 182 Neb. 229, 153 N.W.2d 855 (1967).

7. The sentence imposed of imprisonment for 60 days is well within the statutory limits and does not constitute an abuse of discretion. The license suspension of one year for a first offense is precisely what the statute expressly requires in such circumstances. It does not constitute an abuse of discretion.

8. This court considers one matter not raised by the appellant. In pronouncing sentence, the county court stated: “You’ll be given credit for any time that you’ve spent in jail on this particular offense. And I don’t know if there are – is any time that you’ve spent in jail already for this. Okay. Do you have any questions?” 4:24-5:3. The findings of the written judgment stated: “The Court finds that the [d]efendant should be sentenced to 60 days in jail *with credit given for any time he may have served already, . . .*” T7 (emphasis supplied). Thereafter, judgment ordered that “the [d]efendant is sentenced to [s]ixty (60) days in jail” T7. Contrary to NEB. REV. STAT. § 47-503(2) (Reissue 1998), the court did not “set forth [such credit] as part of the sentence at the time such sentence [was] imposed.”

9. Because the appellant did not assign error in this regard, this court only considers the matter if such constitutes plain error. The higher appellate courts have not expressly determined the failure to comply with § 47-503(2) constitutes plain error. Section 47-503 considers credit for time served upon a sentence to a city or county jail. NEB. REV. STAT. § 83-1,106(5)(a) (Reissue 1999) imposes an identical requirement for sentences to the Department of Corrections. In *State v. Groff*, 247 Neb. 586, 529 N.W.2d 55 (1995), the Supreme Court characterized the failure to calculate the credit for time served as plain error. Because the statutory mandates of §§ 47-503(2) and 83-1,106(5)(a) are virtually identical, this court concludes that failure to comply with § 47-503(2) also constitutes plain error.

10. The circumstances in *Groff* were very similar to the present case, in that the trial court in *Groff* stated “I’m to give you credit for time served” at the conclusion of the sentencing hearing, but the court’s notes, original commitment order and revised commitment order all failed to calculate the amount. *State v. Groff, supra*, at 590, 529 N.W.2d at ____.

11. In *State v. Esquivel*, 244 Neb. 308, 505 N.W.2d 736 (1993), the Supreme Court

observed that prior to 1988, credit for time served was discretionary except where the maximum sentence was imposed. See *State v. Lynch*, 215 Neb. 528, 340 N.W.2d 128 (1983). In 1988, the word “shall” was substituted for the word “may” in § 83-1,106(1), which coupled with § 83-1,106(5)(a), requires the sentencing judge in a criminal case to separately determine, state, and grant the amount of credit on the defendant’s sentence to which the defendant is entitled. *State v. Groff, supra*; *State v. Esquivel, supra*. In 1993, the Legislature adopted the language now codified as § 47-503. 1993 Neb. Laws, L.B. 113, § 3. The Legislature obviously modeled that language on § 83-1,106. Consequently, the Court’s interpretations regarding § 83-1,106 may fairly be expected to apply to § 47-503.

12. In *Groff*, the Supreme Court determined that the Court of Appeals had properly modified the sentences imposed in excess of the maximum allowed minimum penalty, but that the Court of Appeals had failed to order the district court to determine the amount of credit for time served to which the defendant was entitled. The Supreme Court affirmed in part, and in part remanded with directions to remand to the district court for a determination of the amount of credit for time served to which the defendant was entitled. The present case requires a similar disposition.

13. The court therefore concludes that the judgment of the county court should be affirmed in part, and in part remanded with direction to determine the amount of credit for time served to which the defendant is entitled.

ORDER: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The judgment of the county court is AFFIRMED IN PART, AND IN PART REMANDED WITH DIRECTION to determine the amount of credit for time served to which the defendant is entitled.
2. Costs on appeal are taxed to the defendant-appellant.
3. The mandate shall issue as provided by law.

Signed at Butte, Nebraska, on July 17, 2000.
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties, **and deliver a certified copy to county court.**
Done on _____, 20____ by _____.
- Mail postcard/notice required by § 25-1301.01 within 3 days, **stating “Judgment of county court AFFIRMED IN PART, AND IN PART REMANDED WITH DIRECTION.”**
Done on _____, 20____ by _____.
- If not already done, immediately transcribe trial docket entry dictated in open court.
Done on _____, 20____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge

**THE FOLLOWING DOES NOT CONSTITUTE ANY PORTION OF THE ABOVE
JUDGMENT OR ORDER AND IS INCLUDED SOLELY FOR THE CONVE-
NIENCE OF THE CLERK OF THE DISTRICT COURT:**

1. Assuming that the clerk of the district court places the file stamp and date upon this order (the “entry” defined by § 25-1301) on Monday, July 17, 2000, the last day for filing notice of appeal and depositing docket fee for appeal to the Nebraska Court of Appeal would be **Wednesday, August 16, 2000**.
2. If further appeal **is** timely perfected, issuance of the mandate of this court would await the mandate of the higher appellate court.
3. If **no** further appeal is timely perfected, within 2 judicial days after expiration of time for appeal, § 25-2733(1) requires the clerk of the district court to issue the mandate and to transmit the mandate to the clerk of the county court together with a copy of the decision.
4. The clerk of the district court should be prepared to transmit the mandate on **Thursday, August 17, 2000**.
5. In anticipation, at the clerk’s earliest convenience, the clerk should prepare a draft mandate for review to assure that it is properly completed as to form. The form is provided in the form book. The space for the district court decision would be filled in as “**AFFIRMED IN PART, AND IN PART REMANDED WITH DIRECTION**”.
6. The mandate should be prepared in **two** duplicate originals. Both copies would be properly dated as to date of issuance, signed by the clerk, and the district court seal affixed.
7. **One** of the duplicate originals would be filed in the district court file. It would, of course, be file-stamped and docketed.
8. The **other** would be transmitted to county court on the **same day** that it is **issued**. The clerk of the district court would physically hand carry it to the county court clerk for filing in that court. **Attached** to the county court copy should be a **copy of the above judgment or order**. That attached copy does not have to be specially certified. The judge realizes that, pursuant to the court’s instructions, the district court clerk will have already transmitted a certified copy of the judgment or order to the county court at the time of entry. But the statute (§ 25-2733(1)) specifically requires that a copy of the decision be attached to the mandate.