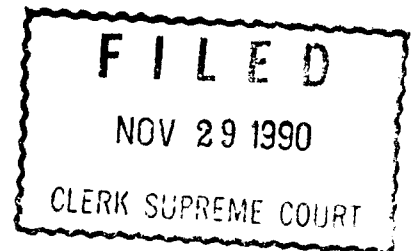


IN THE COURT OF APPEALS OF IOWA

No. 0-570 / 89-1866



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STATE OF IOWA,

Appellee,

vs.

DAWN BATIE,

Appellant.

Appeal from the Iowa District Court for Linn County,
August F. Honsell, Judge.

The defendant appeals her conviction, following a jury trial, for second-degree theft by misappropriation. She (1) challenges the instructions defining the elements of theft by misappropriation and (2) contends the sentencing court abused its discretion by giving her a suspended prison sentence rather than a deferred judgment. **AFFIRMED.**

Linda Del Gallo, Acting State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Julie Ann Halligan, Assistant Attorney General; Denver D. Dillard, County Attorney; and Todd D. Tripp, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Donielson and Habhab, JJ.

DONIELSON, J.

The defendant, Dawn Batie, appeals her conviction, following a jury trial, for second-degree theft by misappropriation. She challenges the instructions defining the elements of theft by misappropriation and also contends the sentencing court abused its discretion by giving her a suspended prison sentence rather than a deferred judgment. We now affirm.

Dawn Batie, while serving as the volunteer treasurer of her son's boy scout troop, misappropriated some \$3800 in troop funds. The theft was not discovered until Batie, in a letter found among the troop's ledgers, resigned her position, confessing the misuse of funds and promising to begin repaying the money. Batie asserts she took the money only because of financial pressures and that she had always intended to repay the money.

Batie was charged with second-degree theft by misappropriation and a jury found her guilty of that crime. The court sentenced Batie to an indeterminate prison term not to exceed five years but suspended the sentence and placed Batie on probation for five years. The court declined Batie's request for a deferred judgment. Batie appeals.

Batie contends the district court gave improper instructions on the elements of theft by misappropriation as stated in Iowa Code section 714.1(2). She asserts the court improperly defined the concept of "using or disposing

of [property] in a manner which is inconsistent with . . . the owner's rights in such property." Relying on State v. Berger, 438 N.W.2d 29 (Iowa App. 1989), Batie contends the trial court erred in not instructing the jury that in order to use property in a manner inconsistent with the owner's rights, the defendant must "deprive" the owner of the property and that deprivation requires more than a mere temporary dispossession. Batie contends that her willingness and ability to repay the money counters the inference that her actions were intended to deprive the Boy Scouts of their property and she was therefore prejudiced by the court's failure to so instruct the jury.

Batie's reliance on State v. Berger is misplaced. In State v. Berger, this court held that the "intent to deprive" language used in section 714.1(1) requires more than a temporary dispossession. Under that section, a defendant's willingness and ability to repay might be of some relevance. However, Batie was charged with violating section 714.1(2).

The preamble to section 714.1 reads, "A person commits theft when the person does any of the following:" and the various subsections of 714.1 define alternative methods of committing theft. Iowa Code section 714.1(2) provides:

2. Misappropriates property which the person has in trust, or property of another which the person has in the person's possession or control, whether such possession or control is lawful or unlawful, by using or disposing of it in a manner inconsistent with . . . the owner's rights in such property. . . .

See generally Eggman v. Scurr, 311 N.W.2d 77 (Iowa 1981) (section 714.1(2) interpreted to require general criminal intent but not specific intent to defraud). We find Batie's attempt to incorporate the "intent to deprive" language from section 714.1(1) would render subsection (2) redundant and contrary to our rules of statutory construction. (State v. Berry, 247 N.W.2d 263 (Iowa 1976), enunciates several of these rules.)

In accord with the statutory definition and with the Eggman decision, the jury was instructed:

The State must prove both of the following elements of Theft:

1. The defendant had possession or control of money which was owned by the Boy Scouts of America Troop No. 63.
2. That from November 1986 up through December 15, 1988, the defendant intentionally misappropriated the money by using it in a manner which was inconsistent with the owner's rights.

Jury Instruction No. 12.

Concerning element number 2 of Instr. No. 12, "misappropriate" means that a person, knowing she had no right or permission to do so, exercises control over property or aids a third person in exercising control, so that the benefit or value of the property is lost to the owner. Misappropriation may also occur when a person knowingly disposes of the property for her own benefit or for the benefit of a third person.

Jury Instruction No. 14.

We conclude these jury instructions adequately explained the applicable law relating to theft by misappropriation. Batie's challenge to the jury instructions is without merit.

Batie next contends the sentencing court abused its discretion by refusing to grant her a deferred judgment. She notes she has no prior criminal record and her crime was prompted by the financial distress of a single parent. Batie states a felony conviction will cause her to lose her job at the Duane Arnold nuclear power plant, which is governed by Nuclear Regulatory Commission rules barring the employment of anyone with a felony conviction. She argues this case should have been resolved in a way permitting her to keep her job, the key to restitution and rehabilitation.

The trial court has discretion in choosing among available and authorized sentencing options in any particular case, Iowa Code § 901.5 (1989), and when a sentence is imposed in accordance with statutory authority, it will be set aside only for an abuse of discretion. State v. Pappas, 337 N.W.2d 490, 494 (Iowa 1983). An abuse of discretion will not be found unless it was exercised for reasons clearly untenable or to an extent clearly unreasonable. Id. The party claiming an abuse of discretion has a heavy burden indeed.

The defendant was convicted of theft in the second degree, in violation of Iowa Code sections 714.1(2) and 714.2(2) (1989). Second degree theft, a class D felony is punishable by a term not to exceed five years. Iowa Code § 902.9(4) (1989). Because defendant's crime was not a forcible felony, the court was free to consider a deferred judgment, a deferred sentence, or a suspended sentence.

Iowa Code § 907.3 (1989). The trial court exercised its discretion and sentenced the defendant to an indeterminate term not to exceed five years but then suspended that sentence and placed the defendant on probation for a period of five years. In reaching its decision, the court enunciated several reasons for its sentence, none clearly untenable or to an extent clearly unreasonable.

Where the trial court exercised its discretion within the statutorily available options and where the court did not consider irrelevant factors, we must conclude the defendant has failed to meet the burden of demonstrating an abuse of the court's discretion. Defendant's sentence is affirmed.

AFFIRMED.