

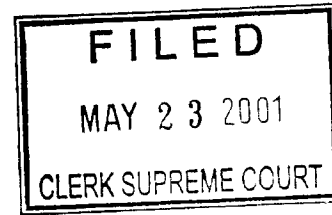
IN THE COURT OF APPEALS OF IOWA

No. 1-250 / 00-0308
Filed May 23, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KATHERINE ANN EWOLDT,
Defendant-Appellant.



Appeal from the Iowa District Court for Scott County, Mark Smith (plea)
and Bobbi M. Alpers (sentencing), Judges.

Katherine Ann Ewoldt appeals from the judgment and sentence entered
upon her guilty pleas to first-degree theft and possession of a controlled
substance. **AFFIRMED.**

Thomas H. Preacher of Stafne, Lewis, Jasper, Preacher & Rowe,
Bettendorf, until withdrawal, and then Dennis A. Bjorklund, Coralville, for
appellant.

Thomas J. Miller, Attorney General, Donald D. Stanley, Jr., Assistant
Attorney General, William E. Davis, County Attorney, and Robert E. Weinberg,
Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Streit, JJ.

STREIT, J.

Katherine Ewoldt claims her sentence for possession of cocaine and first-degree theft is excessive. We affirm.

I. Background Facts and Proceedings.

Katherine Ewoldt worked as an officer manager in Davenport. Ewoldt signed business checks in her boss's name, cashed the checks, and kept the money. She wrote herself checks worth \$19,000 to \$24,000 before her boss caught her. After confessing to him, she wrote herself three more checks worth over \$6000.

Ewoldt was charged with forgery, possession of cocaine, and first-degree theft. Pursuant to a plea agreement, Ewoldt pled guilty to the latter two charges, and the forgery charge was dismissed. Her sentence includes an indeterminate term of incarceration not to exceed ten years for the theft conviction.

On appeal Ewoldt claims her sentence is excessive. She contends it should be vacated and replaced with a ten-year suspended sentence.

II. Standard & Scope of Review.

Our review is for the correction of errors at law. Iowa R. App. P. 4. "Sentencing decisions . . . are cloaked with a strong presumption in their favor. A sentence will not be upset . . . unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure, such as . . . consideration of impermissible factors." *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000) (citations omitted).

III. The Merits.

Ewoldt argues her sentence should be vacated because: (1) the district court considered impermissible factors when determining the sentence, (2) the court was biased against her, (3) the court did not follow the recommendation of the presentence investigation report, and (4) her prior history and her conduct since her arrest warrant a lighter sentence.

A. Impermissible Factors.

Ewoldt argues the district court, when determining her sentence, improperly considered her prior criminal activity. "A court may not consider an unproven or unprosecuted offense when sentencing a defendant unless (1) the facts before the court show the accused committed the offense, or (2) the defendant admits it." *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998). Here, the court stated, "I feel incarceration is appropriate given your background, both criminally and just historically. . . ." The court explicitly noted the presentence investigation report included information about Ewoldt's participation in insurance and welfare fraud. Ewoldt never challenged the accuracy of this information. Accordingly, it stands as admitted. See *Grandberry*, 619 N.W.2d at 402. The court did not consider any impermissible factors when determining Ewoldt's sentence.

B. Bias.

Ewoldt argues a reasonable person in her shoes would question the district court's neutrality. Although she has not specifically identified any statements or other circumstances that reveal the court's bias against her, she appears to be arguing the court's bias is evinced by its improper consideration of

her prior criminal activity. As was discussed previously, the court did not consider any impermissible factors when determining Ewoldt's sentence. Her claim of judicial bias is thus also without merit.

C. Recommendation of the Presentence Investigation Report.

Ewoldt argues the district court should have followed the recommendation of the presentence investigation report and placed her on probation. The court gave valid reasons—namely Ewoldt's background and her propensities—for sentencing her to a term of incarceration.¹ The court was not bound by the presentence investigation report. See *State v. Taylor*, 490 N.W.2d 536, 539 (Iowa 1992) ("[I]t is not an abuse of discretion to refuse to grant probation even in the face of such recommendations.").

D. Mitigating Circumstances.

Finally, Ewoldt argues the district court should not have sentenced her to a term of incarceration given her history and her conduct since her arrest. The court has wide discretion in choosing among available sentencing options. See Iowa Code § 901.5 (1999); cf. *State v. Peckenschneider*, 236 N.W.2d 344, 347 (Iowa 1975) ("The granting of a suspended sentence . . . is a matter of grace, favor, or forbearance. It is not a matter of right."). None of the reasons posited by Ewoldt for a more lenient sentence compel us to vacate her sentence. We affirm the court's judgment and sentence.

AFFIRMED.

¹ In addition to her participation in insurance and welfare fraud, Ewoldt has prior convictions for first-degree theft (1984) and third-degree theft (1995).