IN THE COURT OF APPEALS OF IOWA

No. 3-379 / 92-1711

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

JIMMY RAY FETT,

Appellant.

Appeal from the Iowa District Court for Van Buren County, William L. Dowell, Judge.

The defendant appeals the sentence imposed upon his conviction, following a jury trial, of assault causing bodily injury. **REMANDED FOR RESENTENCING.**

Thomas M. Walter of Johnson, Hester & Walter, Ottumwa, for appellant.

Bonnie J. Campbell, Attorney General, Julie Halligan Brown and James Kivi, Assistant Attorneys General, and Richard Lytle, County Attorney, for appellee.

Heard by Schlegel, P.J., Hayden, J., and McCartney, S.J.* Donielson, J., takes no part.

*Senior judge from the 2nd judicial district serving on this court by order of the Iowa Supreme Court.

SCHLEGEL, P.J.

The defendant, Jimmy Ray Fett, appeals the sentence imposed upon his conviction, following a jury trial, of assault causing bodily injury. He contends the district court abused its discretion by considering impermissible factors in imposing sentence.

The State charged Fett with first-degree sexual abuse for allegedly raping his ex-wife, Janet Fett. The State presented evidence that Fett ruptured Janet's eardrum during the alleged abuse. Fett claimed any sexual activity was consensual. The trial court instructed the jury on first-degree sexual abuse, second-degree sexual abuse, third-degree sexual abuse, assault with intent to commit sexual abuse resulting in serious injury, assault with intent to commit sexual abuse resulting in bodily injury, assault with intent to commit sexual abuse resulting in no injury, assault causing bodily injury, and assault. The jury found Fett guilty of assault causing bodily injury.

At the sentencing hearing several corrections were made to the presentence investigation report. The court stated:

> I am bound by the jury's verdict and what I am going to say is not to be construed that I am in any way contesting the jury's verdict. However, I believe one could draw different conclusions from the evidence that was presented at the time of trial.

The court went on to discuss its observations of Janet's testimony and personality in light of the court's recent intense training in a program for dealing with sex offenders. The court then stated:

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> With regard to the testimony at the time of trial, knowing the pain that is caused by a perforated eardrum, I found it difficult to believe that someone who had just suffered a perforated ear drum would be asking to engage in a sex act.

The court ultimately sentenced Fett to one year in jail with all but 180 days suspended, ordered Fett to undergo evaluation and treatment for assaultive and abusive behavior and to submit to toxicology testing, and required him to perform eighty hours of community service. The court indicated the sentence was based upon Fett's age, the nature of the offense, Fett's poor work record, the fact the crime was committed in front of his daughter, the fact the State and the PSI both recommended incarceration, and opportunities for rehabilitation and protection of the community.

Fett appeals. He asserts the district court's decision was based upon its disagreement with the jury's verdict. He argues no showing was made that he had a substance abuse problem. He also asserts he had no prior offenses. Fett notes the sentencing court preceded its remarks on the sex abuse matters with the statement:

> However, prior to imposing sentence, there are a few observations the court wishes to make in regard to your behavior in this matter and it might help to explain some of the reasons for the sentence that is going to be imposed.

We review for an abuse of discretion. In order to show an abuse of discretion, one generally must show that the court exercised its discretion "'on grounds or for reasons

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clearly untenable or to an extent clearly unreasonable.'" State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting Weeks v. Burnor, 326 A.2d 138, 140 (Vt. 1974)). Sentence imposed by a trial court will be set aside if the court abuses its discretion. State v. Ludwig, 305 N.W.2d 511, 514 (Iowa 1981); State v. Gibb, 303 N.W.2d 673, 687 (Iowa 1981).

Fett argues the severe sentence imposed upon him resulted from the sentencing judge's disagreement with the jury's verdict. Fett contends it is apparent from the sentencing transcript that the sentencing court believed Fett was guilty of sexual abuse and therefore decided to impose a severe punishment upon Fett to compensate for the jury's failure to convict Fett of sexual abuse or a felonious assault. The question for our determination is whether the trial court relied upon impermissible factors in sentencing Fett. We conclude the sentencing court relied upon impermissible factors in imposing sentence and thereby failed to fashion an appropriate sentence based on the jury's verdict. This constitutes an abuse of the sentencing court's broad discretion.

Based on our review of the record, including the sentencing court's comments prior to imposition of sentence and the sentence itself, we conclude the trial court's belief that Fett is a sex offender is apparent. The jury acquitted Fett of any and all sex offenses, finding him guilty of assault causing bodily injury. Despite the

jury's verdict, the sentencing court proceeded to construe the evidence at trial as evidence that Fett's actions constituted sexual abuse, to imply its belief that Fett is a sex offender who requires intervention to correct his behavior, and to impose sentence as if Fett had been found guilty of some form of sexual abuse. We hold this constitutes an abuse of the sentencing court's broad discretion.

Prior to sentencing Fett, the trial court stated:

> [P]rior to imposing sentence, there are a few observations the Court wishes to make in regard to your behavior in this matter, and it might help explain some of the reasons for the sentence that is going to be imposed.
>
> I am bound by the jury verdict, and what I'm going to say is not to be construed that I'm in any way contesting the jury's verdict. However, I believe one could draw a different conclusion from the evidence that was presented at the trial.
>
> I served a term on the Iowa Board of Corrections, Mr. Fett. During that period of time, I served on a task force, a state-wide task force, dealing with sex offenders, and we were trying to develop and integrate a program both within the community setting and the institutional setting to deal with sex offenders. With regard to Janet Fett's testimony, and the reasons she did not immediately report the incident and the manner in which she did report the incident, based upon my training, one could conclude her testimony was credible in that regard. Many times these crimes go unreported by victims such as Janet Fett.
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> * * *
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> With regard to the testimony at the time of trial, knowing the pain that is caused by a perforated eardrum, I found it difficult to believe somebody who just suffered a perforated eardrum would be asking to engage in a sex act.

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> One other observation, based upon my service in developing a sex offender program is that if there is not some sort of intervention and if the person is not held accountable for his acts, that person's behavior will continue.

* * *

> Having said that, Mr. Fett, it is the order and judgment of the Court, . . . [at which time the sentencing court pronounced Fett's sentence as noted earlier in this opinion.]

We find the situation in the present case to be analogous to State v. Floyd, 466 N.W.2d 919 (Iowa App. 1990). In Floyd, the sentencing court was found to have attributed to the defendant a higher degree of guilt than the defendant had been convicted of, and the defendant's sentence was imposed with a higher severity as a result of that attribution. We found the sentencing court had abused its discretion and remanded the case for resentencing. We stated:

> We conclude that the sentencing court may have considered improper factors and, therefore, committed an abuse of discretion. As the Iowa Supreme Court has pointed out many times, we are not in a position to speculate about the weight which the court gave [the improper factors]. We must, therefore, set aside the sentence and remand for resentencing. See State v. Black, 324 N.W.2d 313, 316 (Iowa 1982).

Floyd, 466 N.W.2d at 925.

Having found an abuse of discretion in the instant case, we set aside the trial court's sentence and remand this case for resentencing. The resentencing is to be conducted by a different district court judge.

REMANDED FOR RESENTENCING.