IN THE COURT OF APPEALS OF IOWA

No. 1999-505 (9-762) / 99-523
Filed February 23, 2000

FILED
FEB 23 2000
CLERK SUPREME COURT

STATE OF IOWA,
Appellee,

vs.

RICHARD WAYNE WAGGONER,
Appellant.

Appeal from the Iowa District Court for Mahaska County, Michael R. Stewart, District Associate Judge.

Defendant appeals the judgment and sentence entered upon his guilty plea to third-degree attempted burglary in violation of Iowa Code section 713.6B (1997). **SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, and Charles A. Stream, County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Hecht, JJ.

VOGEL, J.

Richard Waggoner appeals the sentence following his guilty plea to attempted burglary in the third degree in violation of Iowa Code section 713.6B (1997). He alleges the trial court abused its discretion by failing to properly state its reasons for ordering the two-year period of incarceration.

Procedural facts. Waggoner filed a written plea of guilty to a charge of attempted burglary in the third degree in violation of Iowa Code section 713.6B (1997). At that time, he waived his right to file a motion in arrest of judgment and his right to be present at the plea and sentencing proceeding. The court filed a Judgment Entry finding Waggoner guilty of attempted burglary in the third degree and sentencing him to a fine and an indeterminate term of incarceration for two years with credit for time served. Waggoner filed a notice of appeal alleging the court failed to adequately state the relevant reasons for the sentence imposed.

Scope of review. A reviewing court will only disturb a sentence upon a showing that the trial court abused its discretion. *State v. Neary*, 470 N.W.2d 27, 29 (Iowa 1991). No abuse of discretion will be found unless the defendant shows that such discretion was "exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.* The purpose of Iowa Rule of Criminal Procedure 22(3)(d) is to allow a reviewing court to determine whether there has been such an abuse of discretion. *State v. Matlock*, 304 N.W.2d 226, 228 (Iowa 1981).

Preservation of error. The state contends Waggoner did not preserve error on his challenge to the sentence imposed as he failed to provide a record for appellate review. The record before us does not contain a written plea

agreement, a transcript of the proceedings or a criminal history report. It is the appellant's obligation to provide this court with a record for review. *State v. Ludwig*, 305 N.W.2d 511, 513 (Iowa 1981). The claimed error is waived if a defendant voluntarily fails to provide such a record. *See State v. Mudra*, 532 N.W.2d 765, 767 (Iowa 1995) (because the record was incomplete, the reviewing court would not speculate as to what information the trial court considered in ordering a sentence). Waggoner, however, asserts he did not voluntarily fail to provide this court with a record but that such a record was not available to him to forward on appeal. We agree that where no record exists or can be recreated pursuant to Iowa Rule of Appellate Procedure 10(c), the appellant cannot be faulted on appeal for failing to provide one. In this case, the court issued a written judgment entry based solely on Waggoner's written guilty plea. There was no hearing or record made. This deficiency was not a voluntary failure by Waggoner. Therefore, we can proceed to review his assigned error.

Statement of reasons for sentence. Waggoner claims the court abused its discretion by failing to provide any reasons for the sentence imposed. Iowa Rule of Criminal Procedure 22(3)(d) requires the court to state on the record the reason for selecting the sentence ordered. In Waggoner's case, the judgment entry simply stated:

> Pursuant to Sections 713.6B and 903.1 of the Code of Iowa, it is ordered that the defendant be committed to the custody of the Director of the Iowa Department of Corrections for a term not exceeding two years, less credit for 56 days already served upon the term of the sentence.

Clearly, the trial court did not include any reasons for the sentence ordered.

The State contends that the court's failure to state its reasons is harmless error where the court had no discretion in sentencing or had limited discretion and ordered the minimum sentence. *See State v. Snyder*, 336 N.W.2d 728, 729 (Iowa 1983). While that assertion is correct, it is not applicable here. Waggoner's guilty plea was not conditioned on the court accepting the State's sentencing recommendation and the court retained its sentencing discretion. Because the court retained its discretion and failed to provide any reasons that would allow appellate review of Waggoner's sentence, we remand for resentencing.

SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING.