

IN THE COURT OF APPEALS OF IOWA

No. 7-377 / 96-1788

000443

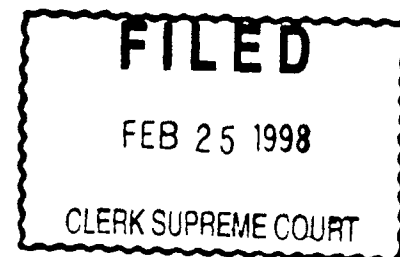
STATE OF IOWA,

Plaintiff-Appellee,

vs.

ELVIN HENRY JOHNSON,

Defendant-Appellant.



Appeal from the Iowa District Court for Hamilton County, Kurt L. Wilke,
Judge.

Defendant appeals from the judgment and sentence entered upon his convictions for two counts of homicide by vehicle in violation of Iowa Code section 707.6A(1)(b) (1995) and one count of serious injury by vehicle in violation of section 707.6A(3). **AFFIRMED.**

Robert W. Brinton and David R. Johnson of Brinton, Bordwell & Johnson,
Clarion, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor and Susan M. Crawford,
Assistant Attorneys General, and Patrick B. Chambers, County Attorney, for appellee.

Heard by Sackett and Streit, JJ., and Habhab, S.J., but decided by Cady, C.J.,
and Sackett, Huitink, Streit, Vogel, and Mahan, JJ.

CADY, C.J.

Elvin Henry Johnson appeals from the judgment and sentence entered following his plea of guilty to two counts of homicide by vehicle in violation of Iowa Code section 707.6A(1)(b) (1995) and one count of serious injury by vehicle in violation of section 707.6A(3). He contends: (1) he received ineffective assistance of counsel; (2) the district court erred in accepting his guilty plea; (3) the court abused its discretion in sentencing him; (4) the court relied upon inadmissible evidence at the sentencing hearing; and (5) the court erred in relying upon victim impact statements completed by people who were not victims. We affirm the conviction and preserve the claim of ineffective assistance of counsel.

Johnson was charged with homicide by vehicle following a collision between his pickup truck and an automobile at a controlled intersection of two county roads near Johnson's house in Hamilton County. Johnson failed to stop for the stop sign, and struck the automobile. The collision resulted in the death of a woman and her child. Another child in the automobile sustained serious injuries.

The State, after a substantial investigation, including the use of a traffic reconstruction expert, determined Johnson was traveling forty-five miles per hour as he entered the intersection. There were no obstructions at the intersection and the weather was dry and clear. The minutes of testimony revealed Johnson was known to drive at a high rate of speed and had failed to obey stop signs in the past.

Johnson entered a plea of guilty. There was no plea bargain. He acknowledged the minutes of testimony were accurate. After a sentencing hearing, the district court sentenced him to an indeterminate term of ten years on each count of homicide by vehicle and two years for serious injury by vehicle. The sentences were imposed concurrently.

I. Guilty Plea

We first address Johnson's claim the trial court did not adequately determine he understood the nature of the offense and that a factual basis existed to accept the pleas. We find Johnson did not properly preserve error by filing a motion in arrest of judgment. *See* Iowa R. Crim. P. 23(3)(a).

II. Sentencing Factors

Johnson next claims the district court failed to consider all relevant factors at the sentencing hearing. We recognize sentencing courts must consider all relevant factors in imposing a sentence. Iowa Code §§ 901.5, 907.5; *State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979). These factors include the circumstances of the case, nature of the offense, defendant's age, prior record, employment, and family circumstances. Iowa Code § 907.5. In determining whether a sentencing court has considered all relevant factors, we review the entire record, not a single remark that may have been taken out of context. *See State v. McKeever*, 276 N.W.2d 385, 387-88 (Iowa 1979).

Johnson claims the district court simply considered the two deaths and serious injury which resulted from the collision in imposing the sentence. The record, however, shows otherwise.

Our review of the sentencing transcript reveals the district court reviewed the presentence report and heard testimony from witnesses by both parties. Moreover, in imposing the sentence the district court specifically mentioned Johnson's lack of prior record, as well as the circumstances of the case and the nature of the offense. Clearly, the seriousness of the offense was a relevant factor, and a sentencing court had a duty to impose a sentence that fit both the offender and the crime. *See State v. Stakenburg*, 215 N.W.2d 265, 267 (Iowa 1974).

III. Presentence Report

Johnson further asserts the sentencing court erred by considering the presentence investigation report which he had not personally reviewed. Johnson, however, failed to preserve error on this issue. The sentencing court asked Johnson at the inception of the sentencing hearing if he wanted time to personally review the report. Johnson declined. Furthermore, Johnson's attorney indicated he had reviewed the report and summarized it for Johnson. Under these circumstances, the court did not abuse its discretion in considering the report.

IV. Victim Impact Statements

Johnson next argues the district court erred by considering letters attached to the presentence report from persons who were not statutorily defined “victims” of the crime. We disagree.

We acknowledge persons outside the “immediate family” have no standing to file a victim impact statement. *State v. Sumpter*, 438 N.W.2d 6, 8 (Iowa 1989). However, all the individuals who filed actual victim impact statements in this case were members of the victims’ “immediate family.” Johnson’s real claim concerns the host of letters attached to the presentence report from extended family members, friends, and community members.

Although our statute provides for the filing of victim impact statements, it does not exclude letters or other input from non-victims. Furthermore, a presentence investigation properly includes an inquiry into the harm to the community. Iowa Code § 901.1(3). Thus, it would not necessarily be improper for the court to consider letters from community members. *See* Iowa Code § 901.5 (court may consider all pertinent information). Furthermore, sentencing hearings are not governed by the same rules of evidence that govern trials, and hearsay may be admissible. *State v. Stanley*, 344 N.W.2d 564, 570 (Iowa App. 1983). The important focus, we believe, is on the contents of the letters, together with the due process precepts of notice and opportunity to respond.

Johnson argues the letters contained allegations of unproven traffic offenses. These allegations concerned his inclination for running stop signs and driving at excessive speeds. Two letters in particular addressed this issue. One was from a community member who described his observations in witnessing Johnson run a stop sign on a specific date. The other letter made a general reference to Johnson's prior conduct in running a stop sign.

The sentencing court may properly consider all the circumstances of the offense in imposing the sentence. The presentence investigation must also take into consideration the circumstances of the offense. Iowa Code § 901.3.

A critical element of culpability in this case concerned the operation of a vehicle in a reckless manner with willful or wanton disregard for the safety of others. This was an element of the crime Johnson acknowledged by pleading guilty. The contested letters included information relevant to this important aspect of the case, and did not necessarily constitute unproven misconduct. Although the information was presented to the court in the form of hearsay, one of the letters was an eyewitness account which went unchallenged by Johnson. If Johnson was concerned about the contents of any of the letters, this concern was not called to the attention of the district court.

It is also important to us in our analysis of this issue that Johnson was provided timely notice of the presentence report and attachments, given an opportunity to correct or make additions to the presentence report, and permitted to offer evidence.

See *State v. Ashley*, 462 N.W.2d 279, 281-82 (Iowa 1990) (due process concerns about the use of evidence of other acts can be minimized by making the information available in the presentence report). He had an opportunity to object. Johnson was not ambushed by the letters. Under the circumstances, we conclude Johnson was treated fairly, consistent with due process. See *State v. Delano*, 161 N.W.2d 66, 72 (Iowa 1968).

Notwithstanding, we presume the district court made proper use of the presentence report and did not give consideration to matters based on rumor, speculation, or conjecture. *State v. Waterman*, 217 N.W.2d 621, 623 (Iowa 1974). To overcome the presumption, there must be an affirmative showing of improper reliance on unproven crimes. *Ashley*, 462 N.W.2d at 282. Under this record no such showing has been made.

V. Ineffective Assistance of Counsel

We preserve all claims of ineffective assistance of counsel except the claim that counsel for Johnson should have filed a motion in arrest of judgment. We can dispose of this claim on direct appeal because Johnson cannot establish prejudice. See *State v. Welch*, 507 N.W.2d 580, 584 (Iowa 1993). The district court substantially complied with Iowa R. Crim. P. 8(2)(b) in accepting the plea of guilty. Furthermore, a factual basis for the plea was established. Thus, Johnson cannot show the outcome of the case would have changed if counsel had filed the motion. The other claims

000450

8

should be preserved for postconviction relief to allow counsel for Johnson an opportunity to respond.

AFFIRMED.

All judges concur except Huitink, and Sackett, JJ., who dissent.

HUITINK, J. (dissenting)

Although I concur with the majority's disposition of Johnson's challenge to his guilty plea and ineffective of assistance of counsel claims, I would vacate Johnson's sentence and remand for resentencing.

The sentencing record includes a petition with 250 names subscribed and a "host of letters attached to the presentence report from extended family members, friends, and community members." These submissions included allegations that Johnson was a habitual traffic violator and urged his incarceration. In its pronouncement of judgment and sentence the district court made the following observations:

THE COURT: This court has reviewed the Presentence Investigation in its entirety. And I have also reviewed at length the victim impact statements. And there were numerous, numerous letters from various individuals regarding this case One of the letters stated that this is such a serious incident it commands serious consequences

Quite frankly, based upon the deaths of two innocent people I am in agreement with that request

The fundamental notions of due process that attend our sentencing procedures were thoughtfully discussed in *State v. Ashley*, 462 N.W.2d 279 (Iowa 1990). In *Ashley*, the court stated:

Our court, quoting *Kent v. United States*, 383 U.S. 541, 562, 86 S.Ct. 1045, 1057, 16 L.Ed.2d 84, 98 (1966), has stated that sentencing hearings need not "conform with all of the requirements of a criminal or even of the usual administrative hearing; but . . . *the hearing must measure up to the essentials of due process and fair treatment.*" *State v. Delano*, 161 N.W.2d 66, 72 (Iowa 1968) (emphasis added). In *State v. Drake*, 259 N.W.2d 862 (Iowa 1977), we discussed the process to which a defendant is due at sentencing:

Although not identified by this court as a due process concept, we distilled the essence of required fundamental fairness in these circumstances when we said:

“A judgment in a criminal case will not be disturbed because of sentencing procedure unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.”

Id. at 281.

The inherent unfairness of the sentencing proceedings in this case is demonstrated by the majority's need to resort to extraordinarily broad constructions of already liberal rules of admissibility to salvage the sentence in this case. The majority concedes the letters cannot be considered as victim impact statements. The majority also unjustifiably characterizes the allegations contained in the letters as something other than unproven criminal conduct. The liberties taken by the majority are simply incompatible with the due process standard articulated in *Kent*, *Ashley*, and *Drake*. Elastic as this standard may be, it cannot be stretched far enough to accommodate the notions of mail-order sentencing the majority has endorsed in this case. Moreover, the district court's comments strongly suggest the information contained in the letters and petition was improperly considered.

Sackett, J., joins this dissent.