IN THE COURT OF APPEALS OF IOWA

No. 0-654 / 00-0287
Filed November 20, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHARLES MARTIN OVERTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire, Judge.

On appeal from a conviction for theft in the second degree, Overton argues that the district court failed to exercise proper discretion in sentence and violated his equal protection rights guaranteed by the United States Constitution and the Constitution of the State of Iowa. **SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Kent A. Simmons, Davenport. for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, Amy Hoel, Student Legal Intern. William E. Davis, County Attorney, and Robert E. Weinberg, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., Streit, J., and C. Peterson, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (1999).

C. PETERSON, S.J.

Charles M. Overton appeals from the sentence imposed after a plea of guilty to the charge of theft in the second degree, a class "D" felony.

At the time of sentence, the State recommended probation and declined to make a recommendation concerning a deferred judgment. Counsel for Overton urged the court to consider a deferred judgment.

Overton was fifty-two years old and was a journeyman finish carpenter and cabinetmaker. The record reflects that he had substantial experience in other trades and was a professional musician. His prior criminal record was a misdemeanor conviction arising from a bad check.

The trial court declined to grant Overton a deferred judgment stating:

> "Well, I typically would not look favorably on a request for a deferred judgment for a 52-year-old individual. I rarely, *if ever,* consider that with conduct of people other than young folks. And what I mean by young folks, 18 to 22. I don't mean 18 to 35. I mean 18 to 22. They are in such a formative stage in their life that the legislature recognized that perhaps there are occasions where they make a single mistake, but they should be allowed to have the opportunity to purge that mistake from their record so that it doesn't affect the rest of their life . . . . And the legislature—the legislature's reason for doing that was precisely what I said. They weren't looking at—They weren't looking at anybody getting a bite of the apple, so to speak, or the old saying that every dog gets one bite. That was not what the legislature said the deferred judgment law was all about. It was to ameliorate the harshness of the effect of a criminal conviction on a young person in that very sensitive period in their life . . . . But you are a 52-year-old man, and in spite of the hardship that you are suffering, you knew it was wrong and illegal to do what you are doing, and nonetheless, you did it.

The court then referred to other factors that prompted the sentence with probation he imposed.

Overton has appealed contending that the court abused its discretion when it denied the request for deferred judgment. Overton also asserts that the court violated his equal protection rights guaranteed by the United States Constitution and the Constitution of the State of Iowa.

I.

Overton asserts the sentencing judge violated his constitutional right of equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution and article 1, section 6, of the Constitution of the State of Iowa. The issue in this controversy has been resolved on other grounds and we do not address the constitutional issue presented. We have a duty to avoid constitutional questions when the merits of a case may be fairly decided without facing them. *In re J.A.N.*, 346 N.W.2d 495, 498 (Iowa 1984).

II.

The review in these proceedings is for the correction of errors. Iowa R. App. P. 4. The determination whether to grant a deferred judgment is within the discretion of the trial judge. The statutes make it clear that the sentencing power is within the discretionary power of the trial judge. Iowa Code § 901.5. This court will interfere with the trial court discretionary powers of sentencing only if such discretionary power has been abused. *State v. Hildebrand,* 280 N.W.2d 393, 396 (Iowa 1979).

Iowa Code section 907.5 identifies the criteria the trial court should consider when deciding whether a deferred judgment, deferred sentence, or a suspended sentence is appropriate. It provides, in pertinent part, as follows:

> Before deferring judgment, deferring sentence, or suspending sentence, the court first shall determine which option, if available, will provide maximum opportunity for the rehabilitation of the defendant and protection of the community from further offenses by the defendant and others. In making this determination the court shall consider the age of the defendant; the defendant's prior record of convictions and prior record of deferments of judgment, if any; the defendant's employment circumstances; the defendant's family circumstances; the nature of the offense committed; and such other factors as are appropriate.

Iowa Code § 907.5.

It is essential that the sentencing judge apply discretion when weighing the sentencing options. In *Hildebrand*, the court stated:

> The trial court and we on review should weigh and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of his reform. The courts owe a duty to the public as much as to defendant in determining a proper sentence. The punishment should fit both the crime and the individual.

Hildebrand, 280 N.W.2d at 396 (citing *State v. Kendall,* 167 N.W.2d 909, 911 (Iowa 1969)).

It is also equally essential that the sentencing judge apply those sentencing factors appropriately and not according to a personal fixed policy affecting a relevant factor. It is not enough to have considered each factor. The factors must be viewed with an appropriate perception of the manner in which they are to be considered. The court is not permitted to arbitrarily establish a fixed policy to govern every case, as that is the exact antithesis of discretion. *State v. Jackson,* 204 N.W.2d 915, 916 (Iowa 1973).

The sentencing judge in this instance described a number of factors that were used for determining the sentence he imposed. However, he revealed a

preconceived personal view concerning the availability of a deferred judgment to this defendant of fifty-two years of age. His comment in sentencing was:

> I rarely, *if ever,* consider that [deferred judgment] with conduct of people other than young folks. And what I mean by young folks, 18 to 22. I don't mean 18 to 35. I mean 18 to 22.

The effect of this personal view is to essentially preclude Overton from consideration as a potential candidate for deferred judgment and foreclose for him one of the criteria the legislature prescribed in determining sentence. While his age may be quite relevant in the evaluation of the application of the consideration of a deferred judgment, he should not be confronted with a closed door to that possibility as one of the alternative options.

The manifest purpose of the deferred sentence procedure is to permit a defendant to avoid otherwise inevitable conviction and a judicial record of the criminal charge by satisfactorily meeting terms of probation voluntarily undertaken before his guilt had been adjudicated. *State v. Farmer,* 234 N.W.2d 89, 92 (Iowa 1975); A penal statute must be construed strictly with doubts resolved in favor of the accused. *State v. Soppe,* 374 N.W.2d 649, 652 (Iowa 1985) (citing *State v. Ridout,* 346 N.W.2d 837, 840 (Iowa 1984)). While the legislature may have had young people in mind when the deferred judgment statute was adopted as expressed by the sentencing judge, the language of section 907.5 does not preclude application of consideration of deferred judgments for persons over twenty-two years of age. That emphatic statement by the sentencing judge represents a personal fixed policy that denied the

defendant of one of the opportunities available in the law for resolution of his criminal act.

This case is remanded to the trial court to reconsider Overton's sentence allowing for the inclusion of a deferred judgment or deferred sentence as one of the options for resolution available to Overton. We are not reflecting by this decision what the appropriate resolution for the criminal act of Overton should be.

SENTENCE VACATED AND REMANDED FOR RESENTENCING.