

FILED

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CLERK SUPREME COURT

358

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff - Appellee,	)	Filed August 9, 1979
vs.	)	
ALFRED LEE GATTON,	)	<u>159</u>
Defendant - Appellant.	)	62349

Appeal from Muscatine District Court - Nathan Grant, Judge.

Defendant appeals from the imposition of sentence for his conviction of second degree murder in violation of section 690.3, The Code 1966, alleging the trial court erred in not ordering a presentence investigation and that the trial court abused its discretion in sentencing him to fifty years. - Judgment vacated and remanded for resentencing.

Mark R. Gillett, of Gillett, Conway & Allison, Muscatine, for Defendant - Appellant.

Thomas J. Miller, Attorney General of Iowa, Selwyn Dallyn, Assistant Attorney General, and S. J. Peterson, Muscatine County Attorney, for Plaintiff - Appellee.

Heard by Oxberger, C. J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant appeals from the imposition of sentence for his conviction of second degree murder in violation of section 690.3, The Code 1966, alleging that the trial court erred in not ordering a presentence investigation and that the trial court abused its discretion in sentencing him to fifty years. We vacate the judgment of the trial court and remand for resentencing.

Defendant was convicted and sentenced for second degree murder in 1966. In 1978, the Iowa Supreme Court vacated the judgment and remanded the case for resentencing. Gatton v. Brewer, 268 N.W.2d 185 (Iowa 1978). At the resentencing hearing, defendant requested that he be sentenced under the provisions of the new criminal code, effective January 1, 1978, and that a presentence report be prepared as required in felony cases by the new code. § 901.2, Supplement to the Code 1977. A presentence report had not been prepared for his sentencing hearing in 1966. The trial court did not grant either request. On appeal, defendant does not challenge the trial court's failure to sentence him pursuant to the new code, but he does claim that a presentence report should have been ordered by the court as mandated by section 789A.3, The Code 1977.

The State initially claims that because the defendant at the resentencing hearing asked for a presentence report as required by the new code, he failed to preserve error on the issue of whether he was entitled to a presentence report under the 1977 Code. Issues not properly raised in the trial court will not be raised for the first time on appeal. State v. Jump, 269 N.W.2d 417, 430 (Iowa 1978). But here we find that defendant adequately raised the issue of a presentence report to allow us to review the matter on appeal.

It has been said that "[t]he use of the presentence report is one of the most important factors in ensuring that justice is accomplished in every criminal case." Comment, Judgment and Sentencing Procedures, 60 Iowa L. Rev. 598, 605 (1975). Prior to August 15, 1973, the Iowa Code contained no provision requiring the preparation of presentence reports in criminal cases. Section 789A.3 became effective on that date. That provision states in part that "[t]he court may consider information from other sources, and shall, if the offense is a felony, order a presentence investigation to be made. . . ." This Code section remained in effect until January 1, 1978, when section 901.2, Supplement to the Code 1977 became effective. That provision states in part that

"[t]he court shall order a presentence investigation when the offense is a class B, class C, or class D felony." Second degree murder under the new code is a class B felony. § 707.3, Supplement to the Code 1977. Even though the new code is not applicable in this case, and even if we determine that the 1977 Code shall also not apply, it is proper to consider these particular provisions in determining legislative intent. State v. Hubbs, 268 N.W.2d 188, 191 (Iowa 1978). The mandatory language in both of these cited provisions clearly indicates that the legislature deems a presentence report essential in imposing fair sentences upon criminal defendants.

The State claims that section 789A.3, The Code, does not have retroactive effect covering crimes committed and convictions rendered before its effective date. The 1966 Code under which defendant was charged contained no comparable provision. Nonetheless, the trial court was to weigh and consider all pertinent matters in determining a proper sentence so that the punishment would fit both the crime and the individual. State v. Cupples, 260 Iowa 1192, 1197, 152 N.W.2d 277, 280 (1967). The question of defendant's sentence was addressed to the sound discretion of the trial court. Id. at 1196-97, 152 N.W.2d at 280. Thus, if defendant's resentencing was governed by the 1966 Code, reversal would be required if the failure to order a presentence report constituted an abuse of the trial court's discretion. If section 789A.3 of the 1977 Code is deemed controlling, the trial court's failure to order a presentence report would constitute a violation of a statutory mandate and reversal would be predicated on this error.

We do not reach the issue of which statute governs because we find that even if the 1966 Code is controlling, the failure to order a presentence report at this resentencing hearing held in 1978 constitutes reversible error. Presentence reports had been mandatory for almost five years at the time of defendant's resentencing hearing. Such reports had been deemed essential by the legislature to avoid the rendering of highly disparate sentences among criminal defendants and to provide the sentencing judge with information needed to determine the fair and proper sentence to be imposed upon the individual defendant. See Comment, supra at 605. We believe that defendant was entitled to the benefit of a presentence report at his 1978 resentencing hearing and that the trial court abused its discretion in not ordering it.

Because we reverse and remand for resentencing, we do not reach the issue of whether the sentence of fifty years was an abuse of the trial court's discretion.

Judgment vacated and remanded for resentencing.