

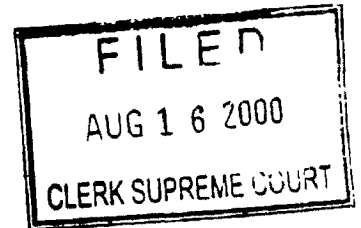
IN THE COURT OF APPEALS OF IOWA

No. 0-425 / 99-1638
Filed August 16, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GREGORY ALLEN BOEDING,
Defendant-Appellant.



Appeal from the Iowa District Court for Muscatine County, James A. Weaver, District Associate Judge.

On appeal from his conviction for operating a motor vehicle while intoxicated, third offense, the defendant argues there was insufficient evidence to support his conviction and the trial court abused its discretion in imposing the maximum sentence of confinement. **AFFIRMED.**

James L. Tappa of Spector, Tappa & Nathan, Rock Island, Illinois, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, Richard R. Phillips, County Attorney, and Teresa Stoeckel, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Miller and Hecht, JJ.

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HECHT, J.

On appeal from his conviction for operating a motor vehicle while intoxicated, third offense, Gregory Boeding argues there was insufficient evidence to support his conviction and the trial court abused its discretion in imposing the maximum sentence of confinement. We affirm.

I. Factual Background and Proceedings. On February 10, 1999, Boeding and his wife, Laura, drove to a restaurant to buy food to take home for dinner. They arrived at the restaurant at approximately 9:30 p.m. While waiting for their food, they both drank beer. A friend of the couple drove Laura home around midnight. Boeding stayed at the bar consuming alcohol until 2:00 a.m. He testified he drank three twelve-ounce beers during the hours he was at the restaurant. Several friends who talked to him that evening testified he did not appear intoxicated.

As Boeding drove home, his vehicle came to the attention of a Wilton police officer. Officer David Roberts testified he noticed Boeding's car was "swerving back and forth from the westbound lane to the eastbound lane and back again almost entering the ditch." In addition, the officer testified Boeding was speeding and failed to stop at a stop sign. Police Explorer Warren Darnell was riding along with Officer Roberts and also observed Boeding's driving. Officer Roberts pulled Boeding's car over and attempted to administer several sobriety tests. Boeding refused to cooperate with the testing. The officer noticed Boeding had an odor of alcohol, had slurred speech and bloodshot eyes. The officer then arrested him.

On February 26, 1999, the State charged Boeding with third-offense operating while intoxicated (OWI) in violation of Iowa Code section 321J.2(1) (1997). Boeding waived his right to a jury trial and on August 18, 1999, the district court entered its findings, conclusions of law, and verdict finding Boeding guilty of OWI, third-offense. On October 12, 1999, Boeding was sentenced to imprisonment for a term not to exceed five years and a \$2500 fine. Boeding appeals.

II. Standard of Review. Our review of a challenge to the sufficiency of the evidence is on assigned error. *State v. McPhillips*, 580 N.W.2d 748, 753 (Iowa 1998). In reviewing Boeding's challenge of the district court's sentence, we review for abuse of discretion. *State v. Johnson*, 513 N.W.2d 717, 719 (Iowa 1994).

III. Sufficiency of the Evidence. Boeding first contends there was insufficient evidence to support his conviction for OWI, third offense, and the district court erred by denying his motion for judgment of acquittal. In deciding whether there is substantial evidence to support a conviction, we view the record in the light most favorable to the State. *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993). Substantial evidence is such evidence as could convince a rational fact finder the defendant is guilty beyond a reasonable doubt. *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998). To convict, the State must prove Boeding operated a vehicle and did so while he was intoxicated. See Iowa Code § 321J.2(1); *Hopkins*, 576 N.W.2d at 377.

Boeding admitted at trial to consuming beer before driving. Officer Roberts observed him swerving on the road, driving fifty miles per hour in a twenty-five mile per hour zone, and failing to stop at a stop sign. The officer followed Boeding with his lights and siren on and Boeding failed to promptly pull over to the side of the road. After Boeding pulled over, the officer approached the car and noticed a strong smell of alcohol emanating from him and that his eyes were bloodshot, red, and watery. He asked Boeding to get out of the vehicle. According to the testimony of Officer Roberts, Boeding had some difficulty getting out of the car. After Boeding exited the car, the officer attempted to administer several field sobriety tests including the horizontal gaze nystagmus and the one-leg-stand. Boeding failed to successfully complete either test. During the entire stop, Boeding made several odd comments, many of which could not be completely understood because of his slurred speech. Officer Roberts arrested him based on his observations. Police Explorer Damell corroborated Officer Robert's observations.

Boeding argues several discrepancies in the testimony create reasonable doubt and, consequently, his convictions should not stand. He points to the fact testimony differed on (1) how far away the police car was from his car when the officer observed his driving (two blocks away or four blocks away); (2) the temperature on the night he was arrested (14 – 20 degrees or 20 – 30 degrees); and (3) whether he had difficulty exiting his vehicle when Officer Roberts requested him to do so. In addition, he testified his erratic driving was due to lack of sleep; his watery, red, and bloodshot eyes were from the cigarette smoke

in the restaurant; and his slurred speech was caused by an injury he received to his face in a previous motorcycle accident.

The fact-finder is free to reject certain evidence, and credit other evidence. *McPhillips*, 580 N.W.2d at 753; *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994). Determinations of credibility are in most instances left for the trier of fact, who is in a better position to evaluate it. *State v. Weaver*, 608 N.W.2d 797, 804 (Iowa 2000). As fact-finder, the district court was free to find Officer Roberts's testimony more credible and reject Boeding's testimony regarding the circumstances of his arrest. Consequently, we conclude the district court did not err by denying Boeding's motion for judgment of acquittal and determine there was sufficient evidence to convict him of OWI, third offense.

IV. Sentencing. Boeding argues the district court abused its discretion by sentencing him to a five-year term of incarceration. A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure, such as consideration of impermissible factors. *State v. Wright*, 340 N.W.2d 590, 592 (Iowa 1983). Sentencing decisions of the trial court are cloaked with a strong presumption in their favor, and an abuse of discretion will not be found unless the defendant shows such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995). In exercising this discretion, the court may consider a variety of circumstances, including the nature of the offense and attending circumstances,

as well as the defendant's age, character, propensities, and chances for reform. See Iowa Code §§ 901.2, 901.3.

Boeding argues the district court failed to consider his propensities and chances for reform. Specifically, he points out he has been employed by the same employer for twenty-two years. He also states his chances for reform are good because he has a stable marriage, support from his family, and a criminal record "absent any non-alcoholic offenses." He argues if the district court had considered these factors, the appropriate sentence would have been minimum jail time and a minimum fine.

The district court did not expressly state on the record whether it had considered Boeding's chances for reform. However, failure to acknowledge a particular sentencing circumstance does not necessarily mean it was not considered. *State v. Boltz*, 542 N.W.2d 9, 11 (Iowa App. 1995). Instead, we look at the entire record and look to see if the reasons articulated by the trial court are sufficient to enable us to determine if an abuse of discretion occurred. *Id.* (citing *State v. Johnson*, 445 N.W.2d 337, 343 (Iowa 1989)). The record in this case sufficiently discloses the district court's exercise of discretion. The record indicates the district court considered the information in the presentence investigation report and stated:

In imposing sentence, I take into consideration your age; the nature of the offense as indicated by the testimony which, in the opinion of the Court, indicated substantial consumption of an alcoholic beverage before driving; apparently your lack of willingness to accept responsibility for your behavior; and your prior criminal record offenses; your employment and family circumstances

There was ample information before the sentencing court to support its conclusion Boeding demonstrated, by recidivism, an unwillingness to accept responsibility for his drinking and the resulting criminal behavior. Although not expressly stated, inherent in this statement is the district court's consideration of whether Boeding could be rehabilitated, particularly in light of the fact he had twice been convicted of public intoxication and three times been convicted of OWI, as indicated by the presentence investigation report. Accordingly, we find no abuse of discretion in the district court's sentence in this case.

AFFIRMED.