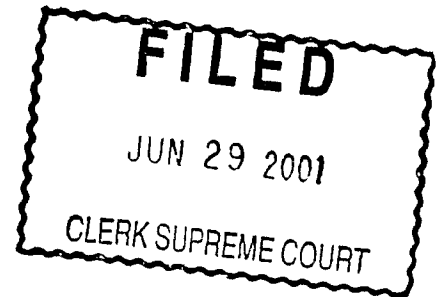


IN THE COURT OF APPEALS OF IOWA

No. 1-287 / 00-1217
Filed June 29, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANIEL RAY DELANEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, David H. Sivright,
Judge.

Defendant appeals from the sentences entered upon his conviction on two
counts of third-degree sexual abuse. **SENTENCE VACATED, REMANDED
FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, Michael E. Wolf, County Attorney, and Gary P. Strausser, Assistant
County Attorney for appellee.

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

VAITHESWARAN, J.

Daniel Ray Delaney pled guilty to two counts of third-degree sexual abuse under Iowa Code § 709.4(1) and was sentenced to two ten-year prison terms, to be served consecutively. On appeal, he argues the district court impermissibly ordered the sentences to be served consecutively in part to ensure he would not be paroled before receiving sex offender treatment.

We review a district court's sentencing decision either for abuse of discretion or for a defect in sentencing procedure, such as the district court's consideration of impermissible sentencing factors. *State v. Gonzalez*, 582 N.W.2d 515, 516 (Iowa 1998). A court's consideration of the timing of parole is an impermissible sentencing factor. *State v. Remmers*, 259 N.W.2d 779, 785 (Iowa 1977). Where improper factors are considered, a sentence must be vacated and the case remanded for resentencing. *State v. Sinclair*, 582 N.W.2d 762, 765 (Iowa 1998).

Prior to sentencing Delaney, the court expressed a concern that Delaney would be paroled before participating in the prison's sex offender treatment program. The court stated:

As counsel noted, the sentence in this case is mandatory because it is a forcible felony. Concerning the question of concurrent or consecutive sentences, I do note that there were two different victims involved here. One was approximately nine years of age at the time of the incident, the other was age seven.

My concern here is that Mr. Delaney receive sex offender treatment under the jurisdiction of the Department of Corrections, obtained during your sentence. Knowing the wait list that is involved for entry into that program, I am concerned that he might be paroled before he is allowed to participate in that treatment while incarcerated.

That is a consideration, but it's also secondary. I think the main thing here is that there were two separate victims, and there is a serious need for Mr. Delaney to receive sex offender treatment.

I have considered his age and all the other information in the presentence investigation report. This is a very close question, and I am mindful of the arguments of Mr. Zimmerman. But I think in this case I'm going to make these sentences be served consecutively. Regardless of whether they're consecutive or concurrent, the time of his release is determined by the Department of Corrections and the Board of Parole. And I do want him to be sure to get sex offender treatment while he is incarcerated.

While we do not quarrel with the court's expressed desire to see Delaney undergo rehabilitative treatment, we believe the court impermissibly imposed consecutive sentences in part to ensure he would remain in prison long enough to receive such treatment. See *Remmers*, 259 N.W.2d at 785 (noting impermissible to partially base sentencing decision on desire to lengthen minimum sentence defendant would serve); *State v. Thomas*, 520 N.W.2d 311, 314 (Iowa Ct. App. 1994) (noting court's statement that it would send defendant to prison if he thought they would actually keep him there for two years was impermissible).

We reach this conclusion despite the court's reliance on the fact there were two separate victims and its statement that the ultimate release date was in the hands of the parole board. Where an impermissible factor is considered along with permissible ones, we have no way of knowing whether the sentence would have differed absent consideration of the impermissible factor. *Thomas*, 520 N.W.2d at 314. For this reason, we have no alternative but to vacate the sentence and remand for sentencing.

SENTENCE VACATED, REMANDED FOR RESENTENCING.