IN THE COURT OF APPEALS OF IOWA

No. 9-552 / 98-0567
Filed December 13, 1999

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK DAVID FLATTERY,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Thomas R. Hronek, District Associate Judge.

Defendant appeals from the sentence imposed following his guilty plea to second-offense operating while intoxicated, contending the district court abused its discretion by sentencing him without considering all relevant sentencing factors, and by relying on a faulty substance abuse evaluation. **AFFIRMED.**

Kermit L. Dunahoo of Dunahoo Law Firm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, Mary E. Richards, County Attorney, and Daniel Gonnerman, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Hecht, JJ.

HECHT, J.

Mark D. Flattery appeals from the sentence imposed following his guilty plea to second-offense operating while intoxicated pursuant to Iowa Code section 321J.2 (1997). He contends the district court abused its discretion by sentencing him without considering all relevant sentencing factors, and by relying on a faulty substance abuse evaluation. We affirm.

I. Factual Background and Proceedings. Mark Flattery ("Flattery") was arrested in November of 1997, for operating while intoxicated (OWI). The State subsequently charged him with operating while intoxicated, third offense and driving while suspended. Flattery later pled guilty to second-offense OWI and operating without a valid license. The district court ordered him to complete a substance abuse evaluation prior to sentencing.

The substance abuse evaluator concluded Flattery did not meet the clinical criteria for alcohol dependence or alcohol abuse, but noted alcohol use had been problematic on "at least two occasions within a 23-month period." However, the evaluation contemplated a history of only two OWI convictions rather than the three Flattery actually had within twenty-four months. The district court noted the evaluator either misunderstood the number of OWI convictions or Flattery had misled the evaluator. Flattery was sentenced to a two-year term of imprisonment and fined $1500. Flattery appeals.

II. Standard of Review. In reviewing Flattery'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). 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).

III. Sentence. Flattery argues the district court failed to consider the appropriate factors when sentencing him. He specifically asserts the district court only considered his three drunk driving convictions in a two-year period to the exclusion of all other factors. The district court should consider all pertinent matters in determining the proper sentence, including "the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances for reform." *State v. Cooley,* 587 N.W.2d 752, 755-56 (Iowa 1998) (quoting *State v. Hildebrand,* 280 N.W.2d 393, 396 (Iowa 1979)). The record is clear the district court correctly considered all of the above factors in determining Flattery's sentence. The district court considered the fact Flattery had three OWI convictions and the circumstances surrounding those convictions. All three occurred within a relatively short period of

time. The first conviction was originally a deferred judgment but was later revoked and he was adjudged guilty of the offense. He completed two treatment programs, one in December of 1996, and one in May of 1997, and then was arrested again for OWI in November of 1997. The district court concluded Flattery was a serious repeat offender and sentenced him accordingly. We do not find this to be abuse of discretion on the part of the district court.

Flattery also contends the court abused its discretion by sentencing him without the benefit of a valid substance abuse evaluation. Iowa Code section 321J.3 requires the district court to order a substance abuse evaluation prior to sentencing when a defendant is convicted of a second or subsequent OWI offense. Iowa Code § 321J.3 (1999). Two exceptions to this requirement have been recognized: (1) when the court receives the substantial equivalent of a substance abuse evaluation; and (2) when the public interest in securing an evaluation has been fully served. *State v. Ruiter,* 547 N.W.2d 226, 227 (Iowa 1996).

The record clearly indicates the evaluator did not have all the relevant facts regarding Flattery's history when she wrote the evaluation. The evaluation report was inaccurate because it assumed a history of two OWI offenses rather than three. The inaccuracy could be the product of either evaluator error or Flattery's misrepresentation of his history. In either event, the evaluation satisfied the requirements of Iowa Code section 321J.3. The sentencing court was fully cognizant of Flattery's history, and was not misled by the inaccuracy within the report. Flattery

was not prejudiced by the evaluation even if the error was purely a product of the evaluator's error. There is no reasonable likelihood the evaluator's assessment would have been more favorable to Flattery if accurate historical assumptions had been made. Likewise, there is no likelihood the sentencing court would have imposed a different sentence had the evaluator correctly assumed a history of three OWI convictions rather than two. Whatever the reason for the evaluation's historical inaccuracy, the district court was not required to continue the sentencing proceedings to a later date in order for the defendant to complete another substance abuse evaluation. If sentencing could be arrested until a defendant provides accurate information to a substance abuse evaluator, defendants could unreasonably delay sentencing. *See State v. Breese*, 581 N.W.2d 631, 632 (Iowa 1998). The district court complied with the provisions of section 321J.3, and we believe the public interest in securing an evaluation has been fully served. *See id.* Accordingly, finding no abuse of discretion, we affirm.

AFFIRMED.