IN THE COURT OF APPEALS OF IOWA

No. 9-704 (1999-447) / 98-1664
Filed January 12, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ERIC JOHN CRABB,
Defendant-Appellant.

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

Eric Crabb appeals from his conviction and sentence following a guilty plea to operating while intoxicated third offense. **AFFIRMED.**

John G. Martens of Terrill & Martens Law Offices, Ames, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, and Mary E. Richards, County Attorney, for appellee.

Heard by Vogel, P.J., Vaitheswaran, J., and Schlegel, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

SCHLEGEL, S.J.

Defendant-appellant, Eric Crabb, challenges his conviction and sentence following a guilty plea to operating while intoxicated third offense. He claims the trial court erred by failing to consider all the sentencing options and by failing to provide sufficient reasons for the sentence imposed. He also claims his plea was not knowingly and voluntarily made because the plea agreement was for a sentence which was impossible for the court to impose. He asserts trial counsel was ineffective in allowing him to enter a plea based on a plea agreement which was legally impossible to implement. Finally, he claims the court erred by failing to inform him the terms of his plea agreement were impossible to fulfill. We affirm.

The State charged Crabb with operating while intoxicated third offense in violation of Iowa Code section 321J.2 (1997). Crabb pled guilty to the charge pursuant to a plea agreement that the State would recommend placement at the OWI Offender Program and would not resist Crabb's request to remain free pending his placement in the program. During the plea colloquy Crabb stated no one had threatened him or promised him anything in return for his guilty plea. Crabb stated he understood that the court would not be bound by the plea agreement and was not required to follow any recommendations made by the lawyers. During the plea colloquy the court set forth both the maximum and minimum penalties for the charge, and Crabb stated he understood. Again the court asked whether Crabb understood that the sentencing judge "is not required to follow any recommendations made by the

lawyers and could conceivably impose any penalty up to the maximum provided for by law." Crabb said he understood. In accepting Crabb's plea, the court found,

> that the defendant's plea is voluntary, being freely and intelligently made, with an understanding of the charge, with knowledge of the penal consequences of the plea, with full knowledge of his constitutional rights, and that said rights are waived by a plea of guilty, without any threats, improper inducements or persuasion. . . .

Crabb did not file a motion in arrest of judgment.

The sentencing hearing occurred about five weeks after Crabb's plea. The court considered the presentence investigation report, Crabb's testimony, and the statements of counsel. His attorney asked the court to suspend all but the mandatory minimum sentence. Pursuant to the plea agreement, the State did not resist. The court sentenced Crabb to up to five years incarceration and imposed a fine of $2500. It remanded Crabb to the sheriff to be delivered to the Oakdale classification center to await placement in the OWI Offender Program. Crabb appeals.

Appellate claims. Crabb claims his counsel was ineffective in allowing him to enter a plea agreement that was legally impossible for the court to fulfill. He argues the department of corrections has a policy that requires a minimum sixty days incarceration for anyone who has previously attended the OWI program before placement in a treatment program. Therefore, he argues, the court was unable to allow him to remain free pending placement in the program. Because it was impossible for the court to follow the plea agreement, Crabb asserts his plea was not knowingly and voluntarily made. He also claims the court erred by failing to inform

him the terms of his plea agreement could not be imposed and the court abused its discretion by failing to provide sufficient reasons for the sentence imposed. The State responds Crabb did not preserve error on the issue of the court failing to inform him his plea agreement was impossible to perform.

Scope of review. We review claims of ineffective assistance of counsel de novo. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). We review sentencing decisions for an abuse of discretion or for defects in the sentencing procedure. *State v. Cason*, 532 N.W.2d 755, 756 (Iowa 1995).

Analysis. The foundation of Crabb's ineffective assistance claim and his claim the court failed to inform him of the mandatory minimum sentence is his argument one term of the plea agreement was impossible to fulfill -- his release pending placement in the OWI residential program. He cites for authority on his impossibility claim a Second Judicial District Department of Correctional Services OWI Program Worksheet. The worksheet provides, in pertinent part:

> Short-Term Incarceration 60 Days (This applies only to individuals who have previously been involved in an OWI treatment program.) If this question is answered yes, the offender will go to short-term incarceration.

Crabb argues the court could not order him released pending admission to the OWI treatment program.

Contrary to Crabb's claim, the current language of Iowa Code section 904.513(1) provides statutory authority for the court to order a defendant released until space in the OWI facility becomes available:

> If there is insufficient space at a community residential facility the court may order an offender to be released to the supervision of the judicial district department of correctional services or held in jail.

Iowa Code § 904.513(1) (1997). Before the 1996 amendment, the statutory language of section 904.513 was even broader in its grant of authority to the district court:

> If there is insufficient space in a community-based correctional program to accommodate the offender, the court may order the offender to be released on personal recognizance or bond, released to the supervision of the judicial district department of correctional services, or held in jail.

Iowa Code § 904.513(1)(c) (1995).

The administrative rules promulgated by the agency to implement Iowa Code section 904.513 mirror the pre-1996 language concerning the authority of the court to order a defendant released:

> 47.2(2) When there is insufficient bed space in the community-based correctional program to accommodate the offender, the court may order the offender to be released on personal recognizance or bond, released to the supervision of the judicial district department of correctional services, or held in jail.

Iowa Admin. Code r. 1-47.2(2)(904) (1992).

We have not found any authority that suggests an agency worksheet overrides the statutory authority given to the district court or the rules promulgated by the agency under its statutory rulemaking authority. Crabb cites no authority that suggests an agency worksheet overrides provisions of the Iowa Code or Iowa Administrative Code. His claim the plea agreement was "impossible" is without merit. The court had the statutory authority to order Crabb released pending availability of a bed in the

treatment facility. The agency's own rules state the court has the authority to order a defendant released. The plea agreement was not "impossible" to perform. Trial counsel, therefore, could not be ineffective in failing to inform the defendant the plea agreement was impossible, nor could the district court have erred by failing to inform him the plea agreement was impossible.

Crabb's remaining claim is that the court abused its discretion in sentencing both by not considering all sentencing options and by not stating its reasons on the record for the sentence imposed. Iowa Code section 901.5 and Iowa Rule of Criminal Procedure 22(3)(d) require a sentencing judge to consider the available sentencing options and to state on the record the reason for selecting a particular sentence. *See State v. Mehner*, 480 N.W.2d 872, 879 (Iowa 1992).

> [T]he main purpose of the requirement in rule 22(3)(d) that a court state its reasons for a particular sentence is to allow us to review the sentence to determine if there has been an abuse of discretion. The statement may be sufficient, even if terse and succinct, so long as its brevity does not prevent review of the exercise of the trial court's discretion. Where the record shows that the sentencing court exercised its discretion, this court will not interfere with an otherwise valid sentence "unless the defendant shows that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable."

Id. (quoting *State v. Kirchoff*, 452 N.W.2d 801, 806 (Iowa 1990)). A court need not state its reasons for rejecting particular sentencing options. *State v. Russian*, 441 N.W.2d 374, 375 (Iowa 1989); *see State v. Powell*, 400 N.W.2d 562, 565-66 (Iowa 1987).

The record reveals the court referred to Crabb's age, marital status, educational background, and employment situation. The court mentioned the presentence investigation report. The court noted his "serious previous criminal history," including prior convictions for public intoxication, theft, operating while intoxicated, and possession of marijuana, and expressed concern about defendant's "continued abuse of alcohol." Noting that Crabb continued to drive when intoxicated despite previous placement in an OWI offenders program, the court discussed the safety threat posed to the community by his behavior. The court also referred to the outlook for defendant's rehabilitation and counseled him that "all it's going to take for you to completely turn this situation around is to abstain from the use of alcohol." We conclude the record demonstrates the sentencing court appropriately weighed a number of factors and made a sufficient statement of its reasons for imposing the sentence without ordering Crabb released. We find no abuse of discretion.

AFFIRMED.