

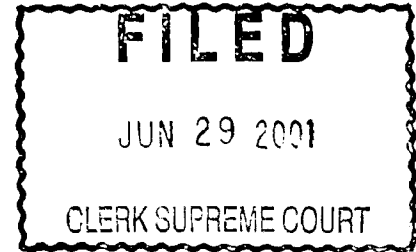
IN THE COURT OF APPEALS OF IOWA

No. 1-275 / 00-1082  
Filed June 29, 2001

**STATE OF IOWA,**  
Plaintiff-Appellee,

vs.

**ROBERT PAUL FORMARO,**  
Defendant-Appellant.



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Appeal from the Iowa District Court for Polk County, Donna L. Paulsen,  
Judge.

Defendant appeals from his conviction for second-degree burglary.  
**SENTENCE AND \$50,000 APPEAL BOND AFFIRMED, \$100,000 APPEAL  
BOND VACATED.**

Alfredo Parrish of Parrish, Kruidenier, Moss, Dunn & Montgomery, L.L.P.,  
Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney  
General, John P. Sarcone, County Attorney, and Nan Horvat and James Ward,  
Assistant County Attorneys, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

**MAHAN, P.J.**

On appeal from his conviction for second-degree burglary, the defendant argues the sentencing court abused its discretion by declining to grant him a deferred judgment or suspended sentence, and considering unproven and unprosecuted offenses. Defendant also contends the court abused its discretion in setting an excessive appeal bond at sentencing. Defendant argues the court lacked jurisdiction to hold a bond review hearing after he filed his notice of appeal. We affirm the sentence imposed and the \$50,000 appeal bond set at sentencing. We vacate the \$100,000 appeal bond and the conditions attached to it, and reinstate the \$50,000 appeal bond set at sentencing.

**Background Facts and Proceedings.** On December 15, 1999, Formaro and five others broke into a woman's apartment. The woman was sexually abused and her property was stolen. Formaro was not involved in the sexual abuse of the victim, and purportedly played a minimal role in the burglary.<sup>1</sup> A trial information, filed January 26, 2000, charged Formaro with burglary in the first degree, in violation of Iowa Code sections 713.1 and 713.3 (1999), a class "B" felony.

Pursuant to a plea agreement, Formaro pled guilty to the reduced charge of burglary in the second degree, in violation of Iowa Code sections 713.1 and 713.5, a class "C" felony. The plea agreement allowed Formaro to enter his plea, remain out on bond, and graduate from high school prior to sentencing. It also

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<sup>1</sup> Formaro drove the co-defendants to the scene, and spent an allegedly brief amount of time in the victim's apartment. He helped distribute the stolen property afterwards.

provided the State would recommend incarceration at the time of sentencing, and Formaro would be free to argue for whatever sentence he felt appropriate.

Prior to sentencing, Formaro underwent a full psychiatric evaluation. Based on interviews with Formaro and his parents and a review of relevant documents, the doctor recommended supervised probation, ongoing weekly counseling, and participation in outpatient substance abuse counseling with random monitoring. In the doctor's opinion, incarceration would undermine gains Formaro made following his arrest, and he did not present a high risk for re-offense.

The presentence investigation report stated Formaro was an appropriate candidate for deferred judgment, but recommended suspended sentence due in part to the seriousness of a sex abuse offense committed by Formaro as a juvenile. In November 1997, at age fifteen, Formaro sexually abused a four-year old boy he was babysitting. He was on juvenile probation and received counseling for one and one-half years. He successfully completed treatment. In accordance with his therapist's recommendation, the court ordered in October 1999 that Formaro would not be required to register on the Sex Offender Registry.

During a lengthy sentencing hearing, Formaro presented testimony and other evidence to support the imposition of a deferred judgment. The district court sentenced Formaro to an indeterminate term of incarceration not to exceed ten years, suspended the minimum fine, and ordered Formaro to make restitution to the victim.

The court set Formaro's appeal bond at \$50,000 cash. When Formaro objected to the amount, the court indicated it could reexamine the amount "at a later time." Formaro filed his notice of appeal on June 29, 2000, the day of his sentencing. On June 30, 2000, a bond reduction hearing was held. At the outset of the hearing, the court questioned its jurisdiction over the matter, but ultimately considered Formaro's arguments and denied his request to reduce his bond.

On July 11, 2000, the State filed an application for bond review, requesting the revocation of Formaro's bond or, in the alternative, the imposition of additional requirements upon him. The State filed an amended application on July 13, 2000, asserting the district court had jurisdiction over the appeal bond issue.

The State alleged Formaro, using the screen name "Good Lickin Male," entered an Internet chatroom and engaged in a conversation with "Kevin Morgan 13," an investigative assistant with the Des Moines Police Department posing as a thirteen-year-old boy. Formaro forwarded a photograph of himself to "Kevin Morgan 13," and the two arranged to meet at the Iowa State Fairgrounds for sex. Police officers observed Formaro's arrival at the fairgrounds at the pre-arranged time. Officers observed Formaro leave the fairgrounds in his vehicle. When he failed to signal a turn, officers stopped him and searched his car. Officers did not find the digital camera Formaro had spoken of during his chatroom conversation. No other items were taken. At the bond review hearing, a fourteen-year-old boy testified a person identifying himself as "Good Lickin Male" contacted him over

the Internet, discussed sex, and sent him pictures of naked teenage males in June 2000.<sup>2</sup>

The court, after a hearing on the jurisdiction issue, determined it had jurisdiction to review Formaro's bond. It subsequently raised Formaro's appeal bond to \$100,000 cash and imposed additional conditions upon him.<sup>3</sup> Formaro appeals the sentence imposed and his appeal bond.

**Sentence Imposed.** Our review is for the correction of errors at law. Iowa R. App. P. 4. 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 the trial court's consideration of impermissible factors. *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998). 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 determining the proper sentence, the district court should weigh and consider all pertinent matters, including the nature of the offense, the attending circumstances, defendant's age, character, and propensities and chances of his reform. *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999) (quoting *State v.*

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<sup>2</sup> No criminal charges were filed in connection with these incidents.

<sup>3</sup> The additional restrictions included: no travel outside Iowa without supervisor's approval; no drugs or alcohol consumed or possessed; random UA drops; maintain full-time employment; no Internet use; minimum weekly contact with supervising agent; maintain current residence or reside with parents; comply with all other reasonable conditions of supervising agent.

*Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979)). The courts owe a duty to the public as much as to defendant in determining a proper sentence. *Id.* The punishment should fit both the crime and the individual. *Id.*

Formaro contends the district court abused its discretion by failing to consider a deferred judgment or suspended sentence. He cites his age, his diminished culpability as compared to his co-defendants, and his acceptance of responsibility for his actions and steps taken to actively turn his life around after his arrest. Furthermore, he argues, the district court improperly relied on the sex abuse charge brought against three of Formaro's co-defendants in making its sentencing determination.

Contrary to Formaro's assertions, the record reveals a careful consideration of sentencing options by the court. In pronouncing its sentence, the court explained:

First of all, I want you to know I've thought long and hard about this decision. I've read all of the letters, and you're a very lucky man. You got a lot of nice family, friends who have been supportive of you. I've looked carefully at all of the materials your attorney has submitted including his brief and the report of Dr. Logan.

....

I have considered all of the factors as allowed by law including but not limited to the fact that you are of a young age, that you don't have an adult record. You do have, however, a juvenile matter. I've considered the presentence report, and I've considered all of the matters as allowed by law that the Court can consider in a sentencing decision.

As you know, I'm very familiar with this case because I've handled the plea and sentencing on all the other young men involved in this. I do recognize that your conduct in this is considerably different and your role in this was considerably less

than many of the other people involved. And I am impressed with the fact that you did after this event occurred get yourself back into school, you did graduate from high school, and it does appear to me that you do have some insight as to why you did this and what happened.

....

So with that background, Mr. Formaro, I want you to understand that I have considered a deferred judgment. I don't give them often, but I have reviewed your file and considered it in this case. And I've decided to reject your request for a deferred judgment because of all the factors, as I've indicated, that I'm allowed to consider in the sentencing that have been set forth on this record and in particular but not limited to the fact that I believe this is a very serious offense that had serious consequences to the victim. And a deferred judgment is simply not sufficient consequences for your conduct.

I likewise have considered your request for a suspended sentence, and a probation, and I am rejecting those requests also. It's my decision . . . that a period of incarceration is appropriate. . . . Again, your age would mitigate against a prison sentence. But I do feel it's appropriate considering all the factors I'm allowed to consider and including but not limited to the very serious nature of the offense and the harm that's been caused to the victim. I don't feel that a period of probation would ensure the safety of the public.

You had a period of probation and counseling for over two years. You committed a serious offense in November 1997. . . . That file was closed out in August of 1999, and then within a short period of time when this incident occurred in December you were again involved in a very serious criminal matter. So I am not convinced that the safety of the public could be ensured in giving you probation at this time.

. . . Now, it's my understanding these gentlemen that were not a good influence on you were not around in 1997 when you committed the other offense. So I don't think you can blame it on their bad influences that here you are four or five months later involved in another serious offense. I do think that with a period of incarceration you can have whatever rehabilitative services you think you need in terms of counseling or treatment in the prison.

I'm just not convinced I am willing to take the risk . . . of putting you on probation given the history you have here, unfortunately, at such an early age.

.....

Moreover, when asked by defense counsel about its consideration of conduct not charged by the State, the court responded as follows:

And if I misspoke, I apologize. I'm not considering any uncharged conduct. I think based on the facts it was clear that Mr. Formaro had nothing to do with the sexual abuse. I am considering his involvement only.

My point was to indicate on the record that he had much less involvement in this incident than some of the other defendants, and he is being sentenced to prison based on his conduct only and that being the burglary in the second degree which he admitted at the time of the plea. So if I misspoke, I apologize for that.

While Formaro can, and did, make a strong argument in favor of a suspended sentence, that is not the issue before us. On appellate review, we are asked to determine whether the judge abused her discretion or considered impermissible factors. We find no abuse of discretion in this record. The court considered the seriousness of Formaro's prior juvenile sexual assault adjudication, and the short lapse of time between the closing of his juvenile case and the burglary offense at issue in this case. It considered the circumstances of the burglary charge, and the consequences to the victim. The court clearly indicated it was not considering any uncharged conduct. It carefully and thoughtfully weighed its sentencing options, and exercised its discretion in an appropriate manner. We affirm the district court on this issue.

**Amount of Appeal Bond.** We review the amount of an appeal bond and its conditions for an abuse of discretion. *State v. Kellogg*, 534 N.W.2d 431, 433

(Iowa 1995). We will not reverse for abuse of discretion unless such discretion is exercised on grounds or for reasons "clearly untenable or to an extent clearly unreasonable." *Id.* at 434 (quoting *Leonard v. State*, 461 N.W.2d 465, 469 (Iowa 1990)).

The district court did not abuse its discretion in setting the appeal bond at \$50,000 cash only. The court explained during the first bond reduction hearing:

We're talking about a plea of guilty and an admission of committing a serious crime, a conviction, a sentencing to prison. . . . And I do not feel this is an exorbitant bond. It's not in any way set to penalize anyone. It is set based on the Court's review of all of the law related to setting a bond. . . .

And in view of the serious nature of the crime, the fact that the defendant has been sentenced to prison, I think there's more of a risk of flight than during the pretrial situation. . . . [T]he bond will continue.

Given the serious nature of Formaro's juvenile offense, and the commission of the burglary at issue shortly after the completion of probation for that offense, the court was well within its discretion when it set Formaro's appeal bond at \$50,000 cash only. Moreover, Formaro posted bond immediately after his sentencing. Therefore, the amount of bond did not affect his ability to avoid incarceration pending the outcome of his appeal.

**District Court Jurisdiction to Review Appeal Bond.** We review questions of subject matter jurisdiction for correction of errors at law. *Keokuk County v. H.B.*, 593 N.W.2d 118, 122 (Iowa 1999). As a general rule, the trial court loses jurisdiction over the merits of a controversy once an appeal is perfected. *Shedlock v. Iowa Dist. Ct.*, 534 N.W.2d 656, 658 (Iowa 1995). An exception to the general rule, however, permits the trial court to retain jurisdiction

over disputes between the parties which are collateral to and not affecting the subject matter of the appeal. *Id.*; *Kirk v. Iowa Dist. Ct.*, 508 N.W.2d 105, 108 (Iowa Ct. App. 1993). The district court lacks jurisdiction when “the issue addressed in the ruling entered after the appeal was filed mimics the issue raised on appeal.” *State v. Grant*, 614 N.W.2d 848, 852 (Iowa Ct. App. 2000).

Formaro argues the appeal bond issue raised by the State after he filed notice of appeal directly related to the issue of his sentence, which he had appealed. He contends the bond imposed pending appeal derives from the sentence. Therefore, he argues, the district court lacked jurisdiction to hear the appeal bond matter because the amount of the bond and the reasons behind the high bond were at issue on appeal.

At the bond review hearing requested by the State, Formaro made it clear to the court the issues raised on appeal included the amount of his appeal bond.

At the hearing on jurisdiction, Formaro’s counsel argued:

[I]n this case the bond is being challenged because it, first of all, may have shown some bias of the Court, it may have shown that the Court intended to punish Mr. Formaro by setting an exorbitantly high bond, that becomes part and parcel of the case. So it’s really not a collateral issue, and it is on appeal. The fact that the bond was set at \$50,000 on appeal, it’s not as a collateral issue, but it’s part and parcel of the sentencing issue itself.

We agree with Formaro. The district court erred in addressing the merits of the State’s application for bond review. Absent permission from the supreme court to hear the bond issue pending appeal, Formaro’s bond should have remained at \$50,000 cash only. We vacate the \$100,000 bond and the conditions attached to it, and reinstate the \$50,000 cash only bond set at the sentencing hearing. We

emphasize, however, our conclusion is limited to the facts of this particular case. We do not hold an appeal bond is never a collateral matter over which the district court retains jurisdiction once an appeal is perfected.

**Conclusion.** We affirm the sentence imposed and the \$50,000 cash only appeal bond set at the sentencing hearing. We vacate the \$100,000 bond and the conditions attached to it, and reinstate the \$50,000 cash only bond set at sentencing.

**SENTENCE AND \$50,000 APPEAL BOND AFFIRMED, \$100,000 APPEAL BOND VACATED.**