



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	Filed October 25, 1983
	)	
vs.	)	
	)	
GERALD DEAN GILL,	)	
	)	
Defendant-Appellant.	)	<u>3-305</u> 83-71 & 83-72

Appeal from Scott District Court - L. D. Carstensen, Judge.

Defendant appeals his sentence of up to five years imprisonment for operating a motor vehicle while intoxicated (third offense). **AFFIRMED.**

Thomas H. Preacher of Newport & Buzzell, Davenport, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Richard L. Cleland, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., Snell and Hayden, JJ.

HAYDEN, J.

Defendant appeals his sentence of up to five years imprisonment for operating a motor vehicle while intoxicated (third offense).

Defendant was convicted of two counts of operating a motor vehicle while intoxicated under Iowa Code section 321.281 (1981) and two counts of operating a motor vehicle while his license was revoked under Iowa Code section 321B.15 (1981). He was sentenced to up to five years imprisonment on each of the OMVUI counts and up to six months imprisonment on each suspended license count. All sentences were to run concurrently. On appeal defendant asserts that the trial court abused its discretion in sentencing him to prison rather than probation with alcoholic treatment. Defendant also argues that the sentence constitutes cruel and unusual punishment prohibited by both the federal and state constitutions.

When a criminal defendant raises issues involving the violation of basic constitutional safeguards, we make an independent evaluation of the totality of the circumstances. This is equivalent to a *de novo* review. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

I.

Cruel and Unusual Punishment. The test for cruel and unusual punishment prohibited by the eighth amendment to the United States Constitution is set forth in Coker v. Georgia, 433 U.S. 584, 592, 97 S. Ct. 2861, 2866, 53 L. Ed. 2d 982, 989 (1977). Defendant alleges that his punishment is excessive as defined in Coker because it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." Id. Defendant's claim is that since he is an alcoholic and cannot control his drinking, incarceration will not benefit him in any way and is simply retaliative in nature.

The United States Supreme Court rejected a similar argument in Powell v. Texas, 392 U.S. 514, 531-37, 88 S. Ct. 2145, 2154-56, 20 L. Ed. 2d 1254, 1267-70

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(1968), when it held that it was not cruel and unusual punishment to convict an alcoholic of the offense of public intoxication. Although the statute involved in Powell imposed only a fine, the added danger to society of drunken driving justifies a more severe penalty here. The same principles apply in both cases.

We do not agree with defendant that incarceration will have no positive effect. The sentence imposed has the positive effect of protecting society from defendant's antisocial conduct and may serve to impress upon defendant the severity of his offense and aid him in his recovery against alcoholism. We encourage the division of adult corrections to provide rehabilitative treatment for the defendant while incarcerated, as well as others who could benefit therefrom. Also, we encourage the defendant to avail himself of any rehabilitation and treatment that may be so provided.

We conclude that the sentence imposed by the trial court did not violate either the federal or state prohibitions against cruel and unusual punishment.

II.

Abuse of Discretion. The trial court did not exceed the maximum penalty allowed by statute. See Iowa Code §§ 321.281 and 902.9(4). In such a case we will interfere in discretionary sentencing only if the trial court did not take into consideration the nature of the offense, the attendant circumstances, the defendant's age, character, propensities, and chances of reform in exercising its discretion. State v. Dvorsky, 322 N.W.2d 62, 67 (Iowa 1982). Our review of the record shows that the sentencing court thoughtfully considered all of these factors.

AFFIRMED.