FILED
MAR 23 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed May 23, 1982
vs.) 570
AMY SCONYERS, JR.,) 2-09 / 66141
Defendant-Appellant.)

Appeal from Jasper District Court - Thomas W. Mott, District Associate Judge.

Defendant appeals from the sentence imposed upon his conviction of OMVUI, first offense, in violation of section 321.281, The Code, asserting that 1) he is entitled to a new trial due to the original trial judge's death after the verdict but prior to resentencing; 2) the sentencing court abused its discretion a) in denying defendant's request for a deferred sentence because the sentencing judge was not familiar with the case and b) by applying a policy of granting a deferred sentence only to youths. AFFIRMED.

Robert F. Wilson, Cedar Rapids, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and M. J. Blink, Assistant Attorney General, for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant, Amy Sconyers, Jr., appeals from the sentence imposed upon his conviction of OMVUI, first offense, in violation of section 321.281, The Code. He asserts that: 1) he is entitled to a new trial because the original trial judge died after the verdict but prior to resentencing upon remand following direct appeal; and 2) the sentencing court abused its discretion a) in denying defendant's request for a deferred sentence because the sentencing judge was not familiar with the case, and b) by applying a policy of granting a deferred sentence only to youths. We affirm.

In April, 1978, defendant was arrested for OMVUI while driving on Interstate 80 in Jasper County, Iowa. At the time of his arrest, he refused to take a breath test or to give a blood sample, and failed to pass several dexterity tests. He was later charged by county attorney's information with OMVUI and was convicted by a jury. Trial court denied defendant's request for a deferred sentence because of defendant's failure to submit to the chemical analysis tests. On appeal, this court remanded the case for resentencing because of trial court's error in considering, as a factor for sentencing, defendant's refusal to submit to a chemical analysis. State v. Sconyers, No. 63062 (Iowa App. Oct. 21, 1980). While that appeal was pending, the original trial judge died and a successor judge was appointed. Prior to resentencing, defendant made a motion for a new trial alleging in substance, that he was entitled to have the same judge preside at trial and sentencing. The court overruled defendant's motion and sentenced him to pay a find of $500 and to serve two days in the Jasper County jail. He was given credit for time served and the mittimus was withheld. Trial court also suspended defendant's drivers license and ordered him to appear at the drinking drivers' school at the area community college nearest his place of residence. From this sentence defendant appeals.

I. Scope of Review. Our review is limited to correction of errors at law. Iowa R. App. P. 4.

II. New Trial. Defendant argues that because of the need to consider attendant circumstances in determining a sentence, a sentencing judge who did not preside at trial cannot properly exercise the requisite discretion. We find this argument without merit.

The procedures to be followed upon a trial judge's disability are succinctly and completely detailed in our rules of criminal procedure. Iowa Rule of Criminal Procedure 18(9)(b)(2) states:

> **After verdict or finding of guilt.** If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilty, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he or she cannot perform those duties because he or she did not preside at the trial or for any other reason, he or she may in his or her discretion grant a new trial.

Thus, the decision to grant a new trial under the circumstances of this case is within the successor judge's discretion.

> "* * * The exercise of a lower court's discretion is not reviewable; it is only the alleged abuse of that power which is reviewable on appeal. * * * [citing authority] Generally, abuse of discretion will be found only where there is no support for the decision in the hearing evidence. * * * [citing authorities]"

Rath v. Sholty, 199 N.W.2d 333, 336 (Iowa 1972), as quoted in State v. Warner, 229 N.W.2d 776, 783 (Iowa 1975). ". . .'[A]buse of discretion' means no discretion to do what was done." Wilkes v. Iowa State Highway Comm'n., 186 N.W.2d 604, 607 (Iowa 1971), as quoted in Warner, 229 N.W.2d at 783.

> "The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. . . . [citing authority]"

Wendel v. Swanberg, 384 Mich. 468, 185 N.W.2d 348, 351 (1971), as quoted in Warner, 229 N.W.2d at 783. In the instant case, the charge was not complex, the facts were relatively simple, and the record was complete. We thus find no abuse of discretion in the lower court's decision to preside over sentencing.

III. Sentence. Defendant also argues that trial court abused its discretion in refusing to defer his sentence. We disagree. In ruling on a motion for a deferred sentence, the sentencing court should attempt to provide maximum opportunity for defendant's rehabilitation, as well as maximum protection of the public from further offenses by defendant. § 907.5, The Code 1981. Factors to be considered in granting a deferred sentence are the defendant's age, prior convictions, employment and family circumstances, the nature of the offense, and such other considerations as are appropriate. Id. The decision to grant or deny a deferred sentence must be made on an individual basis, with no single factor being determinative. State v. McKeever, 276 N.W.2d 385, 387 (Iowa 1979). To prevail on appeal, defendant again must show that trial court abused its discretion. See State v. Buck, 276 N.W.2d 194, 195 (Iowa 1979); State v. Killpack, 276 N.W.2d 368, 373 (Iowa 1979).

Trial court considered the record and thus familiarized itself with the case. See Iowa R. Crim. P. 18(9)(b)(1). Trial court engaged in a lengthy discussion of the reasons why the court would not impose a deferred sentence. Although, in accordance with the above cited authorities, there was discussion of defendant's age and position in the community, no undue emphasis was placed on that fact. There was certainly no evidence of age discrimination. Trial court considered a myriad of factors and arrived at the conclusion that neither defendant nor society would benefit from a deferred sentence, and inferred that it would take more than a deferred sentence to convey the message to defendant that driving while intoxicated is prohibited. We thus find no abuse in the sentencing court's exercise of its discretion.

AFFIRMED.