

IN THE COURT OF APPEALS OF IOWA

FILED

JAN 29 1985

396
CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

DENNIS LEE DOERFLINGER,)

Defendant-Appellant.)

Filed January 29, 1985

4-496
84-951

Appeal from the Iowa District Court for Linn County - L. Vern Robinson,
Judge.

Defendant appeals from the sentence imposed on his conviction of second-
degree burglary in violation of Iowa Code sections 713.1 and 713.3 (1981).
AFFIRMED.

Charles Harrington, Appellate Defender and Raymond E. Rogers, Assistant
Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General and Mickey W. Greene, Assistant
Attorney General, for plaintiff-appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

I. Statement Of The Case

Defendant, Dennis Lee Doerflinger, appeals from the sentence imposed by the trial court following his conviction for burglary in the second degree in December of 1982. The court sentenced him to a term of imprisonment not to exceed fifteen (15) years. Defendant was so sentenced pursuant to a determination that he was a habitual offender.

The defendant appealed from the December, 1982 sentence and this court vacated the sentence and remanded for resentencing. In doing so we ruled that the habitual offender statute was improperly applied because the defendant's two prior felony convictions had occurred on the same date. See State v. Hollins, 310 N.W.2d 216, 217 (Iowa 1981).

Defendant on this appeal asserts that the district court failed to state adequate reasons for selecting the sentence given him on resentencing.

II. Issue To Be Addressed

Whether the trial court abused its discretion in failing to state sufficient reasons for the particular sentence imposed on the defendant.

III. Applicable Law

Our scope of review in this case is on assigned error. See R. of App. P. 4 (1983). The trial court is given the responsibility for imposing sentence after a defendant's conviction of a violation of a criminal statute. See Iowa Code §901.5(1983). The trial court has wide discretion in making a sentencing determination. United States v. Popajohn, 701 F.2d 760, 762 (8th Cir. 1983). Also see State v. Fuhrmann, 261 N.W.2d 475, 479 (Iowa 1978).

" . . . [T]he decisions of the trial court are cloaked with 'a strong presumption in [their] favor,' and '[u]ntil the contrary appears, the presumption is that the discretion of the [trial] court was rightfully exercised.' . . . [T]o overcome this presumption of regularity requires an affirmative showing of abuse and the burden of so showing rests upon the party

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complaining.

"This burden is heavy, indeed, for it can only be sustained by showing abuse and prejudice."

State v. Gartin, 271 N.W.2d 902, 910 (Iowa 1978). An abuse of this discretion will not be found unless the defendant shows "that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable."

State v. Pappas, 337 N.W.2d 490, 493 (Iowa 1983).

The state legislature has the power and responsibility to define crimes and prescribe punishment. State v. Fuhrmann, 261 N.W.2d 475, 479 (Iowa 1978). This power is limited only by the provisions of the Eighth and Fourteenth Amendments which prohibit cruel and unusual punishment. State v. Jones, 298 N.W.2d 296, 299 (Iowa 1980). Before an issue of abuse of discretion can be addressed, we need to know the district court's reasons for imposing the sentence that it did - in this case, namely, a term of imprisonment not to exceed ten (10) years. The mandate for a trial court to give reasons for why particular sentences are imposed is found in statute and the caselaw; see R. Crim. P. 22 (3)(d)(1983); see also State v. Luedtke, 279 N.W.2d 7, 8-9 (Iowa 1979).

At the December, 1982 sentencing, the court gave the following reasons:

The reasons for this judgment and sentence are that it is not discretionary; it is required by me to impose this sentence of a term not to exceed 15 years. It's also based — that is, the sentence, on your prior record, and the recommendation of the pre-sentence investigator and the State.

At the resentencing hearing the trial court judge gave the following reasons for the amended sentence:

It is the judgment of the Court, Mr. Doerflinger, that you are guilty of the offense of Burglary in the Second Degree, in violation of 713.1 and 713.3 of the Iowa Code. You are hereby sentenced to serve a term of incarceration not to exceed 10 years, and you are hereby placed in the custody of the Director of the Division of Adult Corrections for the purpose of serving that term. You are placed in the temporary custody of the Linn County Sheriff pending transportation to the Director.

The reasons for the judgment and sentence are the same that were pronounced on December 20, 1982.

Code section 901.5 espouses what is sought to be accomplished with a criminal sentence. It provides as follows:

After receiving and examining all pertinent information, including the presentence investigation report, if any, the court shall consider the following sentencing options. The court shall determine which of them is authorized by law for the offense, and of the authorized sentences, which of them or which combination of them, in the discretion of the court, will provide maximum opportunity for rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others.

Iowa Code §901.5 (1983).

We hold that the trial judge here was within his discretion in imposing the particular sentence that he did. Defendant, Doerflinger received the maximum sentence possible for a class "C" felon, who is not a habitual offender. The trial judge stated his reasons for imposing the sentence by reference to his remarks made at the December, 1982 sentencing hearing. He referred to the prior record of the defendant and also the contents of the presentence report. Both of these information sources support the sentence given to Doerflinger. He has been in trouble with the law both as a juvenile and as an adult. The protection of the community from further offenses by the defendant warrant an affirmance of this sentence and, likewise, the presentence report indicates that the defendant will be helped toward rehabilitation when made "accountable for his actions."

There was no abuse of discretion in the sentencing of the defendant.

AFFIRMED.

All judges concur except Hayden, J., who dissents.

HAYDEN, J. (dissenting)

I respectfully dissent.

The defendant's sentence rendered by the trial court on December 20, 1982 was vacated by this court in a subsequent appeal. On April 5, 1984, more than two years after the trial court first sentenced the defendant, it relied upon the same reasons, without delineating them on the record in open court, as were given for the judgment and sentence on December 20, 1982. Those reasons were:

1. [i] t is not discretionary.
2. Trial court was required to impose a term not to exceed 15 years.
3. Based on defendant's prior record.
4. The recommendation of the presentence investigator and the State.

When a district court has sentencing discretion, it must state its reasons for imposing a particular sentence on the record. Iowa R. Crim. P. 22(3)(d); State v. Luedtke, 279 N.W.2d 7, 8-9 (Iowa 1979). On appeal, this Court will not disturb a sentence authorized by statute "unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as trial court consideration of impermissible factors." State v. Wright, 340 N.W.2d 590, 592 (Iowa 1983). This Court will find an abuse of discretion in sentencing if the defendant shows "that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979); accord, State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982).

Because burglary in the second degree is not a forcible felony, Iowa Code § 702.11 (1981), the defendant was eligible for a suspended sentence and probation. Iowa Code § 907.3 (1981). The district court, however, refused to grant probation and gave as its only rationale for so refusing the statement of reasons provided at the defendant's original sentencing on a different offense. This constitutes a clear failure to state reasons for the sentence imposed as well as an abuse of discretion.

First the district court, in this resentencing proceeding, improperly incorporated its original reasons for the sentence imposed. At the first sentencing, although the defendant had been convicted of burglary in the second degree, he was not being sentenced for that crime. Rather, the trial court was imposing sentence upon the defendant as an habitual offender pursuant to Iowa Code sections 902.8 and 902.9(2) (1981). After the habitual offender finding was vacated on appeal, the present resentencing concerned only the burglary conviction. In State v. Jackson, 204 N.W.2d 915, 917 (Iowa 1973), this Court stated:

[I]n the end no judge can abdicate his individual responsibility to pass sentence in each case according to his lights, within the statutory limits. Each judge must grapple with the facts and circumstances in the case before him and arrive at the sentence he regards as right. The sentencing function of judges is an arduous and a lonely one, but it is part of judging.

See State v. Pappas, 337 N.W.2d 490, 493 (Iowa 1983). Because this sentencing proceeding involved a different offense, the district court's incorporation by reference of its prior reasons for imposing sentence does not constitute an exercise of the "individual responsibility to pass sentence." The supreme court has stated, "[t]he punishment should fit both the crime and the individual." State v. Cupples, 260 Iowa 1192, 1197, 152 N.W.2d 277, 280 (1967) (emphasis added). The trial court failed to state sufficient reasons for the sentence imposed, and a remand for resentencing is required. See State v. Robbins, 257 N.W.2d 63, 70 (Iowa 1977) (failure to exercise discretion requires resentencing).

I would vacate this sentence and remand again for resentencing.