

IN THE COURT OF APPEALS OF IOWA

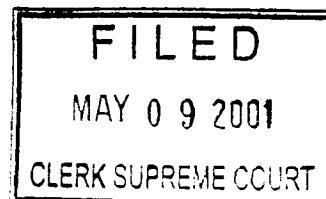
No. 1-190 / 00-0948

Filed May 9, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CRAIG ALLEN ELGUEZABAL,
Defendant-Appellant.



Appeal from the Iowa District Court for Linn County, Thomas L. Koehler and L. Vern Robinson, Judges.

Defendant appeals from the sentence entered following his guilty plea to operating while intoxicated (third offense). See Iowa Code § 321J.2(2)(c) (1999). Defendant contends the district court relied upon an improper factor in imposing sentence. **SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Donald D. Stanley, Jr., Assistant Attorney General, Denver D. Dillard, County Attorney, and Harold Denton and Russell Keast, Assistant County Attorneys, for appellee.

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

MILLER, J.

Craig Allen Elguezabal appeals from the sentence imposed following his guilty plea to operating while intoxicated, third offense, in violation of Iowa Code section 321J.2(2)(c) (1999) contending the district court relied upon an improper factor in imposing sentence. We vacate the sentence and remand for resentencing.

I. BACKGROUND FACTS

Elguezabal was charged with third-offense operating while intoxicated (OWI) and driving while barred in violation of Iowa Code sections 321.560 and 321.561 (1999). Pursuant to a plea agreement he pled guilty to the OWI third offense. The district court sentenced him to an indeterminate five-year term of confinement and a \$2500 fine. The driving while barred charge was dismissed.

Elguezabal appeals from his sentence arguing that the record reflects the district court considered an improper factor in determining his sentence. Specifically, he points to the court's written sentencing order in which the court stated that one of the reasons for the sentence imposed was, "the recommendation of the State". As part of the plea agreement the State had agreed to make no recommendation as to the sentence. Elguezabal concedes that the State abided by its agreement at the sentencing hearing. However, he argues there is also the possibility that the State made a recommendation in discussion that is not part of the record, the court confused his case with another or the court mistakenly believed the State had made a recommendation. He contends that because there is no way of knowing for certain what occurred, and the record affirmatively indicates the court relied in part on a recommendation by

the State, the sentence must be vacated and the case remanded for resentencing before a different judge.

The State argues it did remain silent with respect to a recommendation of prison, although it did agree to certain things at the plea proceeding, such as that Elguezabal receive only the minimum fine. It suggests it is these "recommendations" made at the plea hearing that the district court was referring to in the written sentencing order.

II. SCOPE AND STANDARDS OF REVIEW

Our review of sentencing decisions is for correction of errors at law. Iowa R. App. P. 4. We review for an abuse of discretion or for defects in the sentencing procedure. *State v. Cason*, 532 N.W.2d 755, 756 (Iowa 1995). Sentencing decisions of the district court are cloaked with a strong presumption in their favor. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). A sentence will not be upset on appeal unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure, such as a consideration of an impermissible factor. *State v. Gonzalez*, 582 N.W.2d 515, 516 (Iowa 1998). When the trial court considers an improper sentencing factor, remand for resentencing is required. *State v. Carrillo*, 597 N.W.2d 497, 501 (Iowa 1999).

The general rule requiring error preservation is not ordinarily applicable to void, illegal or procedurally defective sentences. *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). A defendant is not required to raise an alleged sentencing defect in the trial court in order to preserve a right of appeal on that ground. *State v. Wilson*, 294 N.W.2d 824, 826 (Iowa 1980).

III. MERITS

The record shows that during the plea proceedings the State set forth the terms of the plea agreement. The agreement was that Elguezabal would plead guilty to count one of the trial information charging him with third offense OWI and the State would agree to dismiss the driving while barred charge and the simple misdemeanor charges. The State further agreed to make no recommendation as to the sentence, and agreed that whatever fine was imposed would be the minimum fine.

The record further demonstrates that at the sentencing hearing the State abided by the plea agreement and made no recommendations to the court regarding Elguezabal's sentence. However, in the district court's written "Judgment and Sentence," filed June 1, 2000, the court stated, "The reasons for this judgment and sentence are: the nature of the crime; *the recommendation of the State*; and the Defendant's past record of convictions." (Emphasis added).

The transcript of the sentencing hearing provides no evidence that the State made a sentencing recommendation. We thus have serious doubts whether the trial court in fact received or considered any such recommendation. While Elguezabal posits theories concerning why the trial court stated it relied in part on a recommendation by the State, his theories are based on nothing more than speculation or conjecture. We are nevertheless faced with the fact the trial court stated that it relied in part on a recommendation by the State. This would constitute consideration of an impermissible factor, as the plea agreement provided the State would make no sentencing recommendation. We are not in a position to speculate about the weight the sentencing court may have assigned

to this factor. *Carillo*, 597 N.W.2d at 501; *Gonzalez*, 582 N.W.2d at 517. Because the record affirmatively indicates the trial court relied in part on an impermissible factor, the sentence must be vacated and the case remanded for resentencing. *Gonzalez*, 582 N.W.2d at 517.

Elguezabal requests that we order his resentencing hearing be held before a judge other than the judge who previously sentenced him. Although we see no particular reason for doing so, the State does not object to this request and we thus grant it.

SENTENCE VACATED AND REMANDED FOR RESENTENCING.