FILED
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IOWA SUPREME COURT



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

vs.

HECTOR JUNIOR TJERNAGEL,

Defendant-Appellant.

Filed February 5, 1980

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Appeal from Story District Court - George G. Fagg, Judge.

Defendant appeals five-year indeterminate prison sentence for OMVUI (third offense) in violation of section 321.281, Supplement to the Code 1977. Affirmed.

Charles Deppe of Brekken, Deppe & Twedt, Story City, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, Lona Hansen, Assistant Attorney General, and Jerrold L. Handsaker, Assistant Story County Attorney, for plaintiff-appellee.

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

DONIELSON, J.

Defendant appeals five-year indeterminate prison sentence after his third conviction for operating a motor vehicle while under the influence of an intoxicant (OMVUI), a violation of section 321.281, Supplement to the Code 1977. For reversal, defendant asserts the trial court abused its discretion when it sentenced him to an indeterminate five-year imprisonment sentence and the sentence violates the Eighth Amendment prohibition against cruel and unusual punishment. We affirm.

I.

On July 7, 1978, defendant was charged with OMVUI (third offense). Defendant pleaded not guilty and was convicted by a jury. Although the pre-sentence investigator and prosecuting attorney recommended probation and mandatory alcohol abuse treatment, the trial court sentenced defendant to an indeterminate five-year prison sentence. In concluding probation was not appropriate, the trial court noted this crime was a violation of defendant's probation from an earlier OMVUI conviction and defendant had a history of alcohol-related judicial contacts. The trial court recommended defendant be placed in the alcohol abuse treatment program at the medium security facility at Mount Pleasant and that the period of incarceration need not be long.

II.

Defendant raises two closely related issues for our consideration. First, we must answer whether the trial court abused its discretion by imposing the statutory maximum sentence of not more than five years and refusing to grant probation on defendant's conviction of OMVUI (third offense), § 321.281, Supplement to the Code 1977. Under the facts of this case and the factors listed in section 907.5, Supplement to the Code 1977 (standards for release on probation), we find no abuse of discretion.

The decision to sentence a defendant to imprisonment or probation or a suspended sentence is within the sound discretion of the trial court. State v. Noonan, 246 N.W.2d 236, 237 (Iowa 1976); State v. Smith, 244 N.W.2d 325, 327 (Iowa 1976); State v. Peckenschneider, 236 N.W.2d 344, 346-48 (Iowa 1975). When the sentence imposed is within the statutory limit, we will not interfere unless the record discloses an abuse of discretion. State v. Grimme, 274 N.W.2d 331, 338 (Iowa 1979); State v. Grgurich, 253

N.W.2d 605, 606 (Iowa 1977); Noonan, 246 N.W.2d at 237. Here, once the trial court determined defendant should be sentenced to imprisonment, it was required to sentence him to an indeterminate five-year term. §§ 902.3, .9(4), Supplement to the Code 1977. We turn to whether the sentencing decision was an abuse of discretion.

Generally, abuse of discretion will be found only where the decision is not supported by the evidence. Noonan, 246 N.W.2d at 237 (quoting State v. Warner, 229 N.W.2d 776, 783 (Iowa 1975)). Further, discretion involves the idea of choice—a determination made among competing considerations. Id. A sentence represents abuse of discretion if it is "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 exercise of reason but rather of passion or bias." Warner, 229 N.W.2d at 783 (quoting Wendel v. Swanberg, 384 Mich. 468, 475-76, 185 N.W.2d 348, 351 (1971)), quoted in Noonan, 246 N.W.2d at 237.

The trial court's judgment cannot be characterized as perversity of will, defiance of judgment, or the exercise of passion or bias. In making its determination, the trial court considered the factors listed in section 907.5, Supplement to the Code 1977: Defendant's age; prior record of convictions and prior record of deferments of judgment, if any; defendant's employment; defendant's family; and nature of offense committed. The trial court must determine which option "will provide maximum opportunity for the rehabilitation of the defendant and protection of the community from further offenses by the defendant and others." Id. The facts show the trial court's judgment to be reasonable and necessary.

Defendant, forty-nine years old when sentenced and an alcoholic, suffers severe health problems for which he receives treatment and medication. His family is supportive and willing to help with his drinking problem. Although no accident, personal injury, or property damage were connected with defendant's offense, this is due to mere fortuity rather than defendant's conduct. Since defendant's arrest, he has been under treatment for his medical problems, including his alcohol dependency. The pre-sentence investigator and the prosecuting attorney recommended probation and mandatory alcohol abuse treatment.

Weighing against these considerations was the fact this offense was defendant's third OMVUI conviction. Moreover, this incident violated the conditions of probation

for his second OMVUI offense, which occurred in February 1978. A doctor's report stated defendant would not likely refrain from alcohol abuse. The trial court concluded defendant was continuing an "unrelenting pattern of drinking" despite opportunities to subdue his drinking habits. Thus, probation or suspended sentence was unlikely to achieve defendant's rehabilitation. Further, the trial court viewed protection of the community as an important consideration due to defendant's repeated instances of drunken driving. Viewing this same evidence, we likewise conclude sentencing of defendant to imprisonment was proper and necessary.

Defendant also challenges the constitutionality of the five-year imprisonment sentence, contending it is unconscionably severe and grossly disproportionate to the crime of OMVUI. This disportionality, defendant contends, violates U.S. Const., Amend. VIII, the prohibition against cruel and unusual punishment. See State v. Robbins, 257 N.W.2d 63, 68 (Iowa 1977). Punishment is cruel and unusual in violation of the Eighth Amendment if it is barbaric, inflicts torture, or is so excessively severe it is disproportionate to the offense charged. Coker v. Georgia, 433 U.S. 584, 592; 97 S. Ct. 2861, 2865, 53 L. Ed. 2d 982, 989 (1977); Gregg v. Georgia, 428 U.S. 153, 175-76, 96 S. Ct. 2909, 2926, 49 L. Ed. 2d 859, 875 (1976). Under this standard of review, we consider defendant's sentence to be constitutional.

The legislature has wide latitude to prescribe punishment for crimes. State v. Fuhrman, 261 N.W.2d 475, 479 (Iowa 1978); State v. Jackson, 204 N.W.2d 915, 916 (Iowa 1973). Generally, a sentence within statutorily prescribed penalties does not constitute cruel and unusual punishment unless it is grossly disproportionate to the offense. State v. Kyle, 271 N.W.2d 689, 693 (Iowa 1978). The indeterminate five-year sentence for OMVUI is not grossly disproportionate to the offense. Drunken driving causes untold grief and carnage on our state's highways and harsh measures are justified in dealing with offenders, particularly repeat offenders. The sentence does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. See State v. Bousman, 278 N.W.2d 15, 17-18 (Iowa 1979); Robbins, 257 N.W.2d at 68.

In affirming defendant's sentence, we note our agreement with the trial court's recommendation that defendant should be incarcerated at the medium security facility in Mount Pleasant to allow participation in an alcohol abuse prevention program and that his incarceration need not be for an extended period.

AFFIRMED.