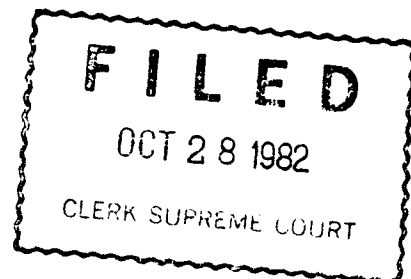


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed October 28, 1982

vs.

)

2-230 356
67366

FRANK ALLEN THURN,

)

Defendant-Appellant.

)

Appeal from Linn District Court, Robert Osmundson, Judge.

Defendant appeals from the sentence imposed on a guilty plea conviction of third-degree criminal mischief in violation of Iowa Code §§ 716.1 and 716.5 (1979).
AFFIRMED.

Leslie E. Stokke, Cedar Rapids, for defendant-appellant.

Thomas J. Miller, Attorney General, and Thomas N. Martin, Assistant Attorney General, for plaintiff-appellee.

Considered en banc.

SNELL, J.

Defendant Frank Allen Thurn and his codefendant Dennis Dean Porter were charged with burglary in the second degree for unlawfully breaking and entering a junior high school with the intent to commit a theft on or about March 31, 1981. On June 22, 1981, both entered pleas of guilty to third-degree criminal mischief charges pursuant to a plea agreement which dismissed the charges of second-degree burglary. The court accepted the guilty pleas and ordered a presentence investigation.

The presentence investigator recommended a six-month straight sentence for defendant Porter at the Community Corrections Center in Cedar Rapids. The recommendation made for defendant Thurn was that he be sentenced to a term of up to two years, with the sentence being suspended on the condition that he be placed at the Community Corrections Center for six months. The sentencing court considered co-defendant Porter's case first and sentenced him to 330 days at the Community Corrections Center, with the provision that he receive credit on the sentence for the 120 days that he had already served in the county jail. The court then sentenced defendant Thurn to a period of two years at the Division of Adult Corrections in Anamosa.

On appeal, defendant Thurn asserts that the trial court abused its discretion in sentencing him to a prison term. Defendant also claims that the court failed to indicate in its judgment entry the code section under which defendant was sentenced and the number of days credited pursuant to Iowa Code § 246.38.

Since this is a criminal action our review on appeal is on assigned error with the exception of those claims alleging constitutional violations, which we review de novo, making an independent evaluation of the totality of the circumstances. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

The only constitutional claim defendant raises is that the trial court violated the prohibition against cruel and unusual punishment by sentencing him to a prison term while sentencing his codefendant to a shorter term at the Community

Corrections Center. We find this argument unpersuasive. The entry of judgment on a guilty plea and the imposition of a sentence thereunder are matters peculiarly within the discretion of the trial court, and the appellate courts cannot interfere with the exercise of that discretion unless it clearly was abused. State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1976); State v. Tracy, 219 Iowa 1412, 1416, 261 N.W. 527, 529 (1935). In determining the proper sentence to be imposed, the sentencing court is to examine and consider all pertinent information, including "the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of his reform." State v. Cupples, 260 Iowa 1192, 1197, 152 N.W.2d 277, 280 (1967). On the basis of these factors, the court is then to decide which sentencing option, in its discretion, "will provide maximum opportunity for the rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others." Iowa Code § 901.5.

In this case the court stated as the reasons for its sentence pronouncement "the record of Defendant and his past offenses and convictions and his history of criminal offenses, his age, the nature of this offense, the recommendation in the presentence report that he be incarcerated." Each of these matters was a permissible consideration. See State v. Cupples, 260 Iowa at 1197, 152 N.W.2d at 280. As the Iowa Supreme Court recently stated: "A sentence must fit the person and circumstances. Each decision must be made on an individual basis, and no single factor is alone determinative." State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982). Although the court was incorrect in its statement regarding the presentence report, because a suspended sentence was recommended, the other reasons given are supported by the record. In particular, defendant's criminal record includes convictions for: fourth-degree theft (5/28/79), possession of beer/intoxication/littering (6/24/79), fourth-degree theft (8/24/79), second-degree

theft (11/26/79), making beer available to minors (5/16/80), interference with official acts (10/18/80). Defendant claims that the sentencing judge impermissibly considered the desirability of separating the two defendants in its decision to send defendant Thurn to Anamosa rather than to the Community Corrections Center. This argument lacks merit for two reasons. First, although the judge did remark that he did not think the two should be sent to the same place, he did not list this as a reason for his sentencing decision and there is no evidence that it influenced the sentence. Second, the desirability of separating the two would have been a permissible factor to be considered under Iowa Code § 901.5 (one of goals of sentencing is to provide maximum opportunity for defendant's rehabilitation).

We cannot conclude that the trial court's sentencing decision violated the prohibition against cruel and unusual punishment even on our de novo review of the issue. A sentence which falls within the statutorily prescribed penalty generally does not constitute cruel and unusual punishment, State v. Dee, 218 N.W.2d 561, 563 (Iowa 1974), and the imposition of the maximum penalty prescribed for an offense has been held proper in other cases in which the defendant had a prior criminal record. E.g., State v. Brown, 176 N.W.2d 180, 183 (Iowa 1970).

Defendant also contends that the court erred in failing to indicate in its judgment entry the code section under which defendant was sentenced and the number of days credited for time already served. Although Iowa Code § 901.6 provides that the court "shall" include these matters in its judgment entry, the Iowa Supreme Court has stated that noncompliance with the provision regarding inclusion of the applicable code section does not prejudice the defendant and therefore is not reversible error. State v. Victor, 310 N.W.2d 201, 205 (Iowa 1981). We now conclude that the same is true of the provision regarding the statement of the days credited to the sentence.

Having considered and rejected each of defendant's contentions regarding the sentencing decision of the lower court, we hereby affirm the sentence.

AFFIRMED.

OXBERGER, C.J., (dissenting).

I dissent. The sentencing judge said one of the reasons he was sentencing the defendant to prison was the recommendation in the presentence report that he be incarcerated.

The presentence report does not recommend incarceration. I would remand this matter to the trial court for a resentencing in light of this error.