IN THE COURT OF APPEALS OF IOWA

No. 6-669 / 96-0532 000418

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

CYNTHIA JUNE FAUSER,

Defendant-Appellant.

Appeal from the Iowa District Court for Jefferson County, Dan F. Morrison, Judge.

Cynthia Fauser appeals from her convictions, following guilty pleas, to assault with intent to commit serious injury and going armed with intent. **AFFIRMED BUT MODIFIED AND REMANDED FOR THE PURPOSE OF ORDERING A PRESENTENCE INVESTIGATION REPORT.**

Steven Gardener of Kiple, Kiple, Denefe, Beaver & Gardener, Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, and John Morrissey, County Attorney, for appellee.

Considered en banc.

HABHAB, C.J.

This is an appeal by defendant challenging her convictions and sentence for the crimes of assault with intent to commit serious injury in violation of Iowa Code section 708.2(1) and going armed with intent in violation of section 708.8. We affirm, but modify and remand for the purpose of ordering a presentence investigation report.

I.

On December 27, 1995, Cynthia Fauser stabbed her husband, Richard Fauser, causing serious injuries. Both parties were intoxicated at the time. Cynthia was charged with attempt to commit murder and going armed with intent.

On February 26, 1996, in accordance with a rule 9 plea agreement, Cynthia entered an *Alford* plea to the crimes of assault with intent to commit serious injury and going armed with intent. *See North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 162 (1970). At Cynthia's request, sentencing took place immediately after the plea. She was given a suspended sentence and placed on probation with the condition she obtain alcohol treatment and counseling. Cynthia now appeals her convictions and sentence.

II.

Cynthia contends the district court failed to properly advise her of her rights prior to accepting her guilty plea. She claims the court failed to advise her: (1) of her right to wait fifteen days before sentencing; (2) of her right to use compulsory process

000420

to compel attendance of witnesses; and (3) of the elements of each of the offenses. She also claims the court failed to find a factual basis for accepting her *Alford* plea.

Cynthia admits she did not file a motion in arrest of judgment. It is clear the district court fully advised Cynthia of the consequences of failing to file such a motion. We determine she has failed to preserve error on the issues raised here for no motion in arrest of judgment was filed. *See State v. Oldham*, 515 N.W.2d 44, 46 (Iowa 1994). But even if error had been preserved, we conclude after a thorough review of the record that each of those three issues raised on appeal are without merit.

III.

Next, Cynthia claims the district court erred in waiving preparation of the presentence investigation report. Under Iowa Code section 901.2, the court is required to order a presentence investigation report when the offense is a class "B," "C," or "D" felony. Going armed with intent is a class "D" felony. Iowa Code § 708.8.

Under Iowa law, a presentence investigation report serves dual purposes of (1) providing the sentencing court with pertinent information and (2) offering suggestions for correctional planning. *State v. Brown*, 518 N.W.2d 351, 352 (Iowa 1994).

The court in *Brown* was careful to note the "distinction between waiving the presentence investigation, prohibited under section 901.2, and waiving the trial court's *use* of the report." *Id.* (citing *State v. Thompson*, 494 N.W.2d 239, 241 (Iowa 1992))

(emphasis added). Preparation of a presentence investigation report for correctional purposes is mandatory. Its *use* may be waived even where the court has discretion to waive a mandatory minimum sentence and the report might contain information favorable to the defendant. *Id.*

In *Brown*, the defendant pled guilty to second-degree murder, a class "B" felony. Because second-degree murder is a forcible felony, the sentence of a minimum of fifty years imprisonment was mandatory. The defendant, in his haste to be sentenced, waived preparation of a presentence investigation report. The supreme court found error in the waiver but it reasoned that since the first stated purpose of a presentence investigation report, aid in sentencing, would not be furthered by a resentencing,[1] the second purpose, aid to correctional authorities, would be satisfied by modifying the district court's ruling by ordering a presentence investigation. For the reasons that follow, we believe the same result should be reached in the case at bar.

The record before us reveals the defendant, in accordance with a written plea agreement, entered a Rule of Criminal Procedure 9 plea of guilty. At the time of her plea, the defendant requested immediate sentencing and waived "formal" preparation of a presentence investigation report.

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[1] Presumably because the sentence imposed was mandatory.

The court was aware of the written rule 9 plea agreement and immediately sentenced the defendant in accordance with each of the provisions thereof. Clearly, the defendant was aware she was entitled to a presentence investigation. The prosecutor and defense counsel, in the presence of the defendant, addressed the court in the following respects:

> MR. MORRISSEY (for the State): There is one thing we could maybe add to the record, and that is in this case as we approached today, we did involve the correctional services and probation officer as far as asking for their assistance with an abbreviated PSI in this matter, and we had the recommendations from correctional services as far as the assistance of Sandy Ploughman available for treatments that could be used. We don't have a formal PSI investigation report on file in this case, and there has been an exchange of information on Ms. Fauser's lack of criminal record and also to the mental health reports from Dr. Fleming at MHI dated February 8 and January 19 between defense counsel and the State of Iowa as well as a separate proceeding that involved Ms. Fauser as far as the placement at the MHI, and we're all aware of that, and those things have been taken into consideration in the plea agreement as a result of the plea that was accepted by the Court here.
>
> I would like the record to reflect that if there is no objection on the part of the defense proceeding without a more formal PSI. We have had the correctional services involved in this for the last two to three weeks.
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> MRS. COCHRAN (defense counsel): Your Honor, we would not object. We believe the State and the probation office have been fully informed of Ms. Fauser's background and would waive that.

Under the circumstances here, the defendant knowingly and voluntarily waived the use of the presentence investigation report in the sentencing process and should not

now complain of any alleged error.[2]

Like in *Brown*, we do not believe the first stated purpose of a presentence investigation report, to aid in sentencing, would be furthered by resentencing. The court at all times had the right under rule 9 to accept or reject the plea agreement. However, once it accepted the plea agreement, the court then agreed to "embody in the judgment and sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than that provided in the plea agreement." The court here did accept the plea agreement and sentenced the defendant in accordance with the written plea agreement. Under this circumstance, resentencing is not necessary. We believe the latter purpose, aid to correctional authorities, will be satisfied by modification of the district court order.

IV.

We modify the sentencing order by requesting the district court to order a presentence investigation. We do not require the trial court to resentence, nor do we retain jurisdiction.

We affirm the district court except we modify the sentencing order by remanding and ordering a presentence investigation.

AFFIRMED BUT MODIFIED AND REMANDED FOR THE PURPOSE OF ORDERING A PRESENTENCE INVESTIGATION REPORT.

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[2] In this respect, under paragraph 3 of rule 9 the court has the authority to "accept a waiver of the presentence investigation . . . . and proceed to judgment." We do not interpret this to mean the court has the authority to waive the preparation of the presentence investigation report, for to do so would create a conflict between that part of rule 9 and section 901.2 of the Iowa Code and case law interpreting that section.