IN THE COURT OF APPEALS OF IOWA

No. 4-530 / 94-0268

FILED
FEB 28 1995
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

EDWARD ANTHONY O'NEILL,

Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, John R. Sladek, District Associate Judge.

Edward O'Neill appeals from the sentence entered upon his plea of guilty to the charge of operating while intoxicated. **AFFIRMED.**

Clemens Erdahl, Iowa City, for appellant.

Bonnie J. Campbell, Attorney General, Angelina M. Smith, Assistant Attorney General, J. Patrick White, County Attorney, and Richard Westphal, Assistant County Attorney, for appellee.

Considered by Hayden, P.J., and Habhab and Huitink, JJ.

HABHAB, J.

Edward O'Neill was charged with operating a motor vehicle while intoxicated, in violation of Iowa Code section 321J.2 (1993), and possession of a schedule I controlled substance (marijuana), in violation of sections 124.204(4) and 124.401(3).

Defendant entered into a plea bargain with the State in which he agreed to plead guilty to the charge of operating while intoxicated and in exchange the State would recommend sentencing of two days in jail and a $500 fine and the State would dismiss the charge of possession of marijuana.

The district court accepted defendant's plea. At the sentencing hearing defendant argued he should be given a deferred sentence because he was twenty-one years old, a junior at the University of Iowa, and had no prior criminal history. The court sentenced him to incarceration in the Johnson County Jail for forty-eight hours and imposed a fine of $500, plus a surcharge and costs. In giving this sentence, the court stated:

> Taking into account the nature of the offense, your age, the driving, the carrying of the marijuana around with you when you're driving through the City of Iowa City, the Court does not feel a deferred judgment and sentence would be appropriate on operating while under the influence of alcohol.

Defendant filed a motion to reconsider. He argued the court should not have based its sentence on his driving because he had not engaged in any dangerous or erratic driving, but had been stopped by police officers because he

had turned right during a red light at an intersection posted "No Right Turn on Red." He furthermore argued his sentence should not be based on the charge of possession of marijuana, which had been dismissed. In making his argument, he admitted he had stated at the time of his arrest, "I know it is stupid to have dope with me." The district court denied the motion for reconsideration. Defendant appealed his sentence.

A sentence will be disturbed by a reviewing court only upon a showing that the trial court abused its discretion. State v. Johnson, 476 N.W.2d 330, 335 (Iowa 1991). No abuse of discretion will be found unless the defendant shows that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. Id.

Defendant claims the district court only considered one factor, the possession of marijuana, in making its decision to deny a deferred judgment.

No single factor should be solely determinative in the decision to grant or deny a deferred judgment. State v. McKeever, 276 N.W.2d 385, 387 (Iowa 1979). The record here shows the court considered several factors when it denied defendant's request for a deferred judgment. These factors included the nature of the offense, defendant's age, his driving, and the possession of marijuana. We conclude the district court did not rely on only one factor in denying a deferred judgment.

Defendant also claims the court considered inappropriate matters in determining what sentence to impose. He believes the court improperly considered the dismissed charge of possession of marijuana when sentencing him.

A sentencing court may not consider those crimes for which the defendant has been charged but not convicted. State v. Barker, 476 N.W.2d 624, 627 (Iowa App. 1991). The district court may not consider a dismissed charge nor the facts arising from it unless these are admitted to by the defendant or independently proved. State v. Black, 324 N.W.2d 313, 316 (Iowa 1982). The supreme court has held a defendant's possession of marijuana may be considered during sentencing for another crime if the record establishes the defendant's possession of the substance. State v. Erickson, 362 N.W.2d 528, 533 (Iowa 1985).

We find there is sufficient evidence in the record to establish defendant's possession of marijuana at the time of his arrest for operating while intoxicated. Defendant admitted he stated at that time, "I know it is stupid to have dope with me." We conclude this is an admission by defendant he had possession of marijuana. Also in the record is the laboratory report identifying as marijuana the green, leafy material taken by police officers at the time of defendant's arrest.

Because the record establishes defendant's possession of marijuana, the district court could properly consider

this as a factor in imposing sentence. We find no abuse of discretion in the sentence imposed by the district court. We affirm defendant's sentence.

AFFIRMED.