

FILED
SEP 24 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)		
Plaintiff-Appellee,	)	Filed September 24, 1985	371
vs.	)		
JEFFREY S. CONNER,	)	<u>5-407</u>	
Defendant-Appellant.	)	85-88	

Appeal from the Iowa District Court for Greene County - M. D. Seiser,
Judge.

The defendant claims that the trial court abused its discretion in refusing
to grant a deferred judgment in this case. **SENTENCE VACATED; REMANDED
FOR RESENTENCING.**

Thomas Polking, Jefferson, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant
Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., Schlegel, and Hayden, JJ.

SCHLEGEL, J.

The narrow issue in this case is whether the court erred in failing to grant a deferred judgment or sentence to defendant. Defendant claims that the trial court abused its discretion in refusing to grant a deferred judgment in this case.

Jeffrey Conner entered a plea of guilty to the crime of operating while intoxicated (OWI).

Due to the fact that the charge was for a first offense OWI, and due to defendant's otherwise clear record and exemplary citizenship, the prosecution and defense counsel both recommended to the sentencing judge that defendant be granted a deferred judgment. The judge, after finding that defendant satisfied the standards set forth in the sentencing statutes for deferred judgments, sentenced the defendant to pay a fine of \$300, plus a 10% surcharge, and sentenced him to incarceration for 48 hours, less any time held. With credit for seven hours served, defendant was ordered to serve an additional 41 hours "consecutively."

Defendant appeals the sentence, and the court's refusal to grant deferred judgment, claiming the court abused its discretion in imposing such sentence and in denying a deferred judgment.

Following the filing of a written plea of guilty, on the same day the sentencing hearing was held. The defendant testified on his own behalf, and his immediate superior in his employment testified as to work habits, his reputation in the community, and his family relationships. Thereafter, the prosecuting attorney reaffirmed his previously stated recommendation that the "appropriate sentence in this case would be a deferred judgment." The court, in summarizing its feelings on this case, stated:

I trust you're a good parent. I think you'll be a good father afterwards. I think you made a mistake, but I would have difficulty in saying in my mind, "This man should get a deferred," unless I'm going to make it a

policy that virtually everybody gets a deferred unless it's shown to me he shouldn't.

And I don't think that's the intent of it. I regret it for you because I think there are judges who have that attitude about alcohol and this problem. And it's unfortunate if you come to a judge—but I have given deferreds, but those cases—in my mind I can say, "That was a real reason for doing that. That is unique and unusual." (Emphasis added.)

And that isn't appropriate in this case, and I do think, that in all fairness, the code says we are to look at those things: rehabilitation, which is a low priority in your case because you apparently have the determination and the self-discipline needed; protection of society from you, which again tends to be low; and other offenses. And I think that the Code does recognize that this does have some effect on others.

And I just regret that I can't cross that bridge in your case. Say I see enough that is unique or different—there are many things admirable about you and I certainly regret you did make this mistake. And I'm glad no harm came to you or anybody else. (Emphasis added.)

It is the order of this Court that you be fined \$300

and proceeded to assess the fine, surcharge, confinement, and costs.

I. Defendant claims the trial court abused its discretion by failing to apply reasoned discretion in sentencing defendant.

Sentencing is discretionary with the trial courts. State v. Killpack, 276 N.W.2d 368 (Iowa 1979).

Where the sentence imposed is within the statutory maximum, we will interfere only if an abuse of discretion is shown. State v. Leudtke, 279 N.W.2d 7, 8 (Iowa 1979). There, the Iowa Court stated:

In order for such a standard to operate, it is essential for the trial court to state the reasons for selecting a particular disposition. Without such a record, there would be nothing from which we could discern any abuse of discretion.

The requirement that reasons be stated on the record has been embodied in Iowa Rule of Criminal Procedure 22(3)(d).

The exercise of discretion means consideration of the facts and circumstances necessary to a sound, fair, and just determination. State v. Jackson, 204 N.W.2d 915 (Iowa 1973).

In State v. Jackson, supra, while striking down a general order prescribing a uniform sentence, the Iowa Supreme Court, quoting from In re Frazzita, 147 N.Y.S.2d 11, 16-17 (Sup. Ct. 1955), stated:

There are many instances in which the Supreme Court and other courts are required to exercise discretion. Any such determination has long been recognized as requiring an actual exercise of judgment upon the part of the Court. To do so necessitates a consideration by the Court of the facts and circumstances which are necessary to make a sound, fair and just determination. The Court is not permitted to establish a fixed policy to govern every case, as that is the exact antithesis of discretion.

In State v. Hildebrand, 280 N.W.2d 393 (Iowa 1979), the supreme court condemned a policy in sentencing in operating a motor vehicle under the influence (OMVUI) cases, "that when there is an accident involved, I do not and will not grant a deferred sentence." In that case, the court discussed its former holdings concerning sentencing. State v. McKeever, 276 N.W.2d 385, 387 (Iowa 1979), reiterated the prior holdings "that the punishment must fit the particular person and circumstances under consideration; each decision must be made on an individual basis, and no single factor, including the nature of the offense, will be solely determinative." State v. Jackson, supra, and State v. Boston, 233 Iowa 1249, 11 N.W.2d 407, 411 (1943). In Hildebrand, the court also quoted:

The duty of a sentencing judge in every case is to consider the available options, to give due consideration to all circumstances in the particular case, and to exercise that option which will best accomplish justice both for society and for the individual defendant.

State v. Robbins, 257 N.W.2d 63, 70 (Iowa 1977).

Concerning the court's "fixed policy" in Hildebrand, the supreme court stated:

In the case before us, it is plain the sentencing court, instead of considering the minimal essential factors we consistently have identified, impermissibly selected only one—an attending circumstance—which triggered the court's previously-fixed sentencing policy. It is equally clear the court's personal, well-defined rule precluded the exercise of its discretion in rendering judgment. (Citations omitted.)

Upon that reasoning, the court vacated the sentence and remanded the case for resentencing. In directing the court to resentence the defendant, it said:

...[T]rial court shall employ its discretion in light of all those factors identified in Cupples. [State v. Cupples, 260 Iowa 1192, 1197, 152 N.W.2d 277, 280 (1967) ("The trial court and we on review should weigh and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of his reform.")] (Emphasis added.)

In so holding we do not intimate the accident is unimportant or irrelevant as an attending circumstance, nor do we suggest what the sentence should be. We only direct it shall be imposed by an exercise of the court's discretion without application of a personal, inflexible policy relating to only one consideration. (Emphasis added.) Hildebrand, 283 N.W.2d at 397.

II. In the case before us, unlike in Hildebrand, the court made no direct statement of a sentencing policy. The judge in Hildebrand clearly stated that his policy dictated that when there had been an accident in connection with the offense of operating a motor vehicle under the influence (OMVUI) he would not grant a deferred sentence. In the present situation, it is impossible to determine the reasons why the court refused to grant a deferred judgment to this defendant. The only reason that can be inferred from the record is that defendant or defendant's case was not "unique" or "different." From this language, one must infer that the court's policy is to grant no deferred dispositions unless the case, or the defendant, is "unique" or "different." In other words, the court's basic policy, as gleaned from this record, is that he will grant no deferred judgments.

The trouble with this policy is that absent some statement upon the record as to why this case does not qualify as "unique" or "different," we are left in a position to be unable to discern if the court has abused its discretion in sentencing the defendant. See State v. Leudtke, supra.

We do not suggest that the trial court should or should not grant a deferred judgment. It is apparent that the court informed itself of the factors set out in Cupples. The nature of the offense, the attending circumstances, defendant's age, character, propensities, and chances of reform were all made a part of the record. On all counts, the defendant appeared to be a low risk for future involvement with the law. The court selected one factor in denying a deferred judgment. That factor was, the case is not unique or different. Without a further record as to the meaning of that standard or factor, the sentence pronounced does not comply with Iowa Rule of Criminal Procedure 22(3)(d). Without that further record, we cannot determine if the court abused its discretion.

We vacate the sentence and remand the case for resentencing.

SENTENCE VACATED; REMANDED FOR RESENTENCING.

Hayden, J., concurs; Donielson, P.J., dissents.

DONIELSON, P.J. (dissenting)

I dissent.

I feel the majority unduly focuses on the repeated statement regarding uniqueness in the court's order and is too eager to find an abuse of discretion.

The majority states:

In the present situation, it is impossible to determine the reasons why the court refused to grant a deferred judgment to this defendant. The only reason that can be inferred from the record is that defendant or defendant's case was not "unique" or "different." From this language, one must infer that the court's policy is to grant no deferred dispositions unless the case, or the defendant, is "unique" or "different." In other words, the court's basic policy, as gleaned from this record, is that he will grant no deferred judgments.

I disagree with the majority's characterization because it is not impossible to determine the reasons why the court refused to grant a deferred judgment. "Uniqueness" was not the only reason why the court refused to grant a deferred judgment.

Defendant perpetrated a criminal act—OWI—and he pled guilty. Because many serious injuries, including death, are caused by intoxicated drivers, this charge is not to be taken lightly. Incarceration can be ordered so as to avoid unduly deprecating the seriousness of the crime. State v. Pappas, 337 N.W.2d 490, 495 (Iowa 1983). This was one reason why the judge refused a deferred judgment.

In Pappas, the supreme court vacated a decision of this court involving a judge's decision not to grant probation to a lawyer who pled guilty to theft and perjury. The judge indicated that the defendant's status as a lawyer influenced his decision and the court upheld this decision by stating:

Our reading of the trial court's comment, taken in context, leaves us a great deal less sure than the court of appeals that the trial court was unduly influenced by the fact that defendant was a lawyer. We think the point made by the sentencing judge was that defendant's status as

a lawyer in this "white collar" crime could not be ignored. He was not being sentenced as a lawyer, however, but as a person guilty of theft and perjury who happened to be a lawyer.

Id. at 494.

Similarly, I think the point made by the sentencing judge was that defendant's status as a typical OWI offender could not be ignored. Defendant was not being sentenced as a person who failed to show that his case was unique, but as a person guilty of OWI who happened not to present any extenuating factors. I believe the majority is unwilling to accord weight to the reasons for the sentence stated on the record.

No one is entitled to a deferred judgment. Even if the prosecutor makes such a recommendation, it is not binding. State v. Grugurich, 253 N.W.2d 605, 606 (Iowa 1977). Although defendant was a "good citizen," the fact remains he committed a bad act—OWI—and the trial court felt he should be punished. Apparently it is not unusual for a "good citizen" to be charged with OWI, but this fact alone does not necessarily mandate a deferred judgment. The trial court considered all the relevant factors and I simply do not believe this decision constitutes an abuse of discretion.