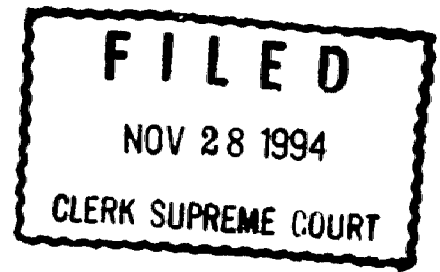


IN THE COURT OF APPEALS OF IOWA

No. 4-383 / 93-1765



STATE OF IOWA,

Appellee,

vs.

THEODORE PREHM,

Appellant.

Appeal from the Iowa District Court for Delaware County, James C. Bauch and Jon Fister, Judges.

Theodore Prehm appeals from the sentence imposed upon his guilty plea to indecent contact with a child in violation of Iowa Code section 709.12 (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds Lapointe, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich, Assistant Attorney General, and Lou Walker, County Attorney, for appellee.

Considered by Donielson, C.J., and Hayden and Cady, JJ.

DONIELSON, C.J.

Defendant, Theodore Prehm, contends the sentencing court abused its discretion by considering lack of remorse in a case involving an Alford plea. An Alford plea allows a defendant to plead guilty without admitting the elements of the offense. In such a plea the defendant acknowledges the evidence strongly negates his claim of innocence and enters the plea to avoid a harsher sentence. Committee on Professional Ethics v. Sturgeon, 487 N.W.2d 338, 340 (Iowa 1992).

Our review is for an abuse of discretion or a defect in the sentencing procedure such as a trial court's consideration of impermissible factors. State v. Wright, 340 N.W.2d 590, 592 (Iowa 1983). From our review of the parties' arguments, the record, and relevant case law, we find there was no error in the sentencing and affirm the trial court.

Prehm was charged with sexual abuse in the second degree. Pursuant to an agreement with the State he entered an Alford plea of guilty for the lesser crime of indecent contact in violation of Iowa Code section 709.12. During the hearing at which he entered his guilty plea, Prehm admitted the matters set forth in the deposition of the 11-year-old victim.

A presentence investigation report was prepared and submitted to the court prior to Prehm's sentencing. Prehm cooperated with the preparation of the report. The report

recommended imprisonment as opposed to a deferred judgment or participation in a sexual offender treatment program. This recommendation appears to have been based, in large part, upon the fact Prehm denied he had engaged in any wrongdoing or had hurt the victim.

The report reflects Prehm characterized the victim as vindictive and untruthful and stated "I don't care if she lives or dies right now." The report also reflects he vehemently denied the physical conduct he had with the victim was sexual or inappropriate in any way, and he expressed no empathy for the victim.

The presentence investigation report indicates sentencing options were discussed with Prehm and he stated "whatever it takes to keep me from going to jail I'll do. I'll kiss ass if I have to." At the sentencing hearing Prehm was asked if he had anything he would like to add to remarks made by his attorney. He responded "No sir, It's just I am sorry for what happened and what I did do. That's all really I can say. I don't know what else to say."

At the sentencing hearing the judge expressed concern because Prehm had not expressed any remorse for the offense or harm done to the victim until the time of the sentencing hearing. He was concerned Prehm's motivation to express remorse was enhanced by the fact he was on the verge of going to jail. Citing the nature of the crime, Prehm's prior record and the recommendations in the presentence

investigation report, the trial court sentenced Prehm to two years of incarceration.

Prehm challenges the sentence and, relying on State v. Ramirez, 400 N.W.2d 586, 590 (Iowa 1987), asserts a defendant's refusal to admit guilt is an inappropriate consideration in a sentencing on an Alford plea. Supreme Court dicta confirms this interpretation of Ramirez. See State v. Mattly, 513 N.W.2d 739, 741 (Iowa 1994) (refusal in an Alford plea to admit guilt is an inappropriate basis for recommending incarceration). While a refusal to admit guilt is an improper consideration, this court has previously held a defendant's admission of guilt is not an impermissible consideration in an Alford plea sentencing. See State v. Hansen, 344 N.W.2d 725, 730-31 (Iowa App. 1983) (consideration of guilty plea in Alford plea sentencing not an error where defendant had admitted he was guilty during colloquy at sentencing hearing).

This case is distinguishable from Ramirez and the dicta in Mattly because the sentencing court did not improperly consider a defendant's refusal to admit guilt. Instead it considered the victim's deposition (the allegations of which Prehm had admitted when he plead guilty) and the inconsistency between the statements Prehm made to the presentence investigator and his sudden expression of remorse at the time of the sentencing hearing. It was within the sentencing court's discretion to consider these

factors and we find no abuse of discretion in the sentence entered.¹

AFFIRMED.

1. Our resolution of this appeal eliminates the need to address the ineffective assistance of counsel claim raised in a footnote in Prehm's brief.