IN THE COURT OF APPEALS OF IOWA

No. 0-826 / 00-0630
Filed February 28, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Appellee,

vs.

NATHAN LINN HINES,
Appellant.

Appeal from the Iowa District Court for Linn County, Thomas Koehler, Judge.

Nathan Linn Hines appeals the district court's sentencing following his plea of guilty to third-degree sexual abuse in violation of Iowa Code section 709.4(2)(c)(4) (1999). **AFFIRMED.**

Barbara H. Liesveld of Thinnes & Liesveld, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Darrel L. Mullins, Assistant Attorney General, Denver D. Dillard, County Attorney, and Russell Keast, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Mahan, JJ.

VOGEL, J.

Nathan Linn Hines appeals the district court's sentencing following his plea of guilty to third-degree sexual abuse in violation of Iowa Code section 709.4(2)(c)(4) (1999). Because we find the trial court did not abuse its discretion in the sentence ordered, we affirm.

Background facts. Hines was charged by trial information with sexual abuse in the second-degree. Prior to the hearing on March 10, 2000, the State amended the charge and Hines plead guilty to third-degree sexual abuse and waived his right for time before sentencing. He was sentenced to an indeterminate term of incarceration not to exceed ten years.

The charge arose from a sexual encounter between Hines, a fourteen-year-old female and Hines' friend and co-defendant, Jason Sedlacek. Sedlacek had participated in an on-going sexual relationship with the victim prior to the night in question. On February 14, 1999 Sedlacek called the victim and arranged to pick her up. Sedlacek, Hines and the victim drove in Hines' van to a secluded area where both men engaged in sexual contact and intercourse with the young girl. Hines' only contact with the girl was on this particular occasion. The trial court ordered a prison sentence for both defendants and Hines now appeals.

Scope of review. A sentence will be disturbed by a reviewing court only upon a showing that the trial court abused its discretion. *State v. Neary*, 470 N.W.2d 27, 29 (Iowa 1991). Sentencing decisions of the trial court are cloaked with a strong presumption in their favor. *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995). 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.*

Sentencing order. On March 10, 2000, the trial court accepted Hines' guilty plea. Hines elected to proceed directly to sentencing. Hines now contends the trial court both failed to adequately state its reasons for imposing the chosen sentence and failed to exercise its discretion in sentencing by deciding not to order a deferred or suspended sentence.

Iowa Code section 901.5 outlines the trial court's duty in the sentencing process, stating:

> After receiving and examining all pertinent information, including the presentence investigation report and victim impact statements, if any, the court shall consider the following sentencing options. The court shall determine which of them is authorized by law for the offense, and of the authorized sentences, which of them or which combination of them, in the discretion of the court, 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.

In determining the sentence appropriate to the two defendants in this case, the trial court made the following comments:

> I believe that both of these Defendants are minimizing the seriousness of the offense. I believe that both of these Defendants should be sentenced to prison. I'm going to sentence them both to ten years in prison.
>
> The reasons for and the facts supporting the sentences are as follows: The Defendant's age, the nature of the offense, the sentence will hopefully hold the Defendant accountable and act as a deterrent for future offenses by this Defendant and others, and the sentence in each case will hopefully rehabilitate the Defendant.

Hines now alleges the trial court did not adequately state its reasons for the sentence imposed and failed to properly exercise its discretion, as is evidenced by his receipt of a prison sentence rather than a deferred or suspended sentence. He urges us to consider his lack of criminal history and limited involvement with the victim and determine if his sentence is too severe. Our review, however, is not de novo, which would permit us to impose a sentence we determine to be appropriate. Rather, our review is to determine if the trial court exercised, but did not abuse, its discretion. *State v. Laffey,* 600 N.W.2d 57, 62 (Iowa 1999).

The purpose of Iowa Rule of Criminal Procedure 22(3)(d) is to allow a reviewing court to determine whether there has been such an abuse of discretion. *State v. Matlock,* 304 N.W.2d 226, 228 (Iowa 1981). A sentencing court's statement of its reasons satisfies the rule if it recites reasons sufficient to demonstrate the exercise of discretion and indicates those concerns which motivated the court to select the particular sentence which it imposed. *See State v. Johnson,* 445 N.W.2d 337, 342-43 (Iowa 1989); *State v. Victor,* 310 N.W.2d 201, 205 (Iowa 1981).

In the case before us, the trial court provided several reasons for the sentence chosen, including a failure by the defendant to accept the appropriate degree of responsibility for his actions. The level of contrition demonstrated by Hines at the sentencing hearing is a credibility call made by the trial court. A trial court, having seen and heard the defendant first hand, is in a better position to determine credibility than on review. *State v. Jacobs,* 607 N.W.2d 679, 685

(Iowa 2000). The trial court then provided for the record a list of five additional reasons it considered in determining the sentence ordered. "A statement may be sufficient, even if terse and succinct, so long as the brevity of the court's statement does not prevent review of the exercise of the trial court's sentencing discretion." *State v. Johnson*, 445 N.W.2d 337, 343 (Iowa 1989). Clearly, the trial court in the case before us demonstrated its exercise of discretion as required by our case law.

Ineffective assistance of counsel. Hines further argues his trial attorney was ineffective for failing to sever his case from his co-defendant's case for the plea and sentencing and for advising him to waive time before sentencing. Generally, claims of ineffective assistance of counsel are preserved for postconviction proceedings. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa Ct. App. 1994). A defendant has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty and, as a result, he was prejudiced. *State v. Howell*, 557 N.W.2d 908, 913 (Iowa Ct. App. 1996). A reviewing court can deny an application for postconviction relief based on the failure to prove prejudice, without deciding whether counsel's representation was deficient. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992); *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

Here, Hines seems to indicate the trial court may have considered some improper factors or confused the two defendants during the sentencing process. The record, however, does not reflect any misstatement by the trial court or reference to inappropriate sentencing considerations. *State v. Phillips*, 561

N.W.2d 355, 359 (Iowa 1997) (finding the record contained no showing of reliance by the trial court on improper factors). To demonstrate prejudice, a defendant must prove there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Atwood,* 602 N.W.2d 775, 784 (Iowa 1999). Hines cannot meet this standard to show he was prejudiced. He has presented only speculation and conjecture as to whether the possible errors by his attorney would have resulted in a different outcome. Accordingly, we affirm.

AFFIRMED.