IN THE COURT OF APPEALS OF IOWA

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No. 5-648 / 94-1329

STATE OF IOWA,

Appellee,

vs.

DIANA GIAMBELLUCA a/k/a DIANNE GIAMBELLUCA,

Appellant.

Appeal from the Iowa District Court for Floyd County, Paul W. Riffel, Judge.

The defendant appeals her conviction and sentence on one count each of nonsupport of a minor child, false imprisonment, and neglect of a dependent person.

AFFIRMED.

Larry D. Sather of Larry D. Sather, P.C., Denver, Colorado, and Jeanne K. Johnson, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Normand Klemesrud, County Attorney, and Thomas H. Miller, Assistant Attorney General, for appellee.

Heard by Hayden, P.J., and Cady and Huitink, JJ.

HUITINK, J.

Diana Giambelluca appeals her conviction and sentence on one count each of nonsupport of a minor child, false imprisonment, and neglect of a dependent person. We affirm.

On November 26, 1993, at 9:30 a.m., Diana Giambelluca dressed her elderly mother, Dorothy Diebolt, in warm clothes and tied her to a chair in the Giambelluca backyard. The chair was inside a dog pen which had barbed wire around the top. The gate to the dog pen was chained and locked, and the doors to the Giambelluca home were locked, sealed, and barricaded. The weather that day was cold and windy, with a temperature of twelve degrees Fahrenheit and a wind chill factor of eight degrees below zero.

Diana and her husband, Lawrence, then took their six children to Mason City for a double feature movie and grocery shopping. The Giambellucas were gone for approximately five and one-half hours. While the Giambellucas were in Mason City, the Iowa State Patrol received an anonymous tip that Dorothy was tied to a chair in the cold weather. The troopers removed Dorothy from the dog pen, called an ambulance, and sent her to the hospital. Dorothy's treating physicians found she was suffering form hypothermia and stated she ultimately would have died from exposure had she not been discovered.

Following an investigation, the State charged Lawrence and Diana with numerous crimes involving mistreatment of Dorothy and nonsupport of the Giambelluca's children. The children were placed in foster care.

Diana was arraigned on December 14, 1994. She pled not guilty to all charges and demanded her right to a speedy trial. During that same hearing, the district court consolidated this case with Lawrence Giambelluca's case. Diana later changed her pleas to guilty on the neglect of a dependent person charge and entered *Alford* pleas to the nonsupport of a minor child and false imprisonment charges.

At the sentencing hearing, Diana expressed remorse at what she did to Dorothy. Diana stated that Dorothy had requested to be placed outside while the family was in Mason City and that she agreed because she was afraid her mother would wander away if she were left alone without restraints. Diana asked the court to suspend her sentences and place her on probation. The court rejected this request and sentenced Diana to concurrent sentences of ten years, five years, and six months. Diana's motion for reconsideration of sentence was denied.

Like Diana, Lawrence also received concurrent sentences of ten years, five years, and six months. Lawrence challenged that sentence in a companion case to this appeal, claiming the sentences should have been suspended and that he should have been placed on probation. He also claimed that he was denied effective assistance of counsel. We affirmed the district court's sentence and preserved Lawrence's

ineffective assistance of counsel claims for postconviction proceedings. *State v. Giambelluca*, No. 94-1346 (Iowa Ct. App. October 31, 1995). The supreme court denied Giambelluca's petition for further review.

On appeal, Diana contends the district court erred in imposing the maximum sentence on each count. She also alleges the district court relied solely on the nature of the offense when fashioning an appropriate sentence and did not state the reasons for the sentence imposed. She further argues she was denied effective assistance of counsel.

We first address Diana's sentencing claims. A sentence will be disturbed by a reviewing court only upon a showing that the trial court abused its discretion. *State v. Dicks*, 473 N.W.2d 210, 215 (Iowa Ct. App. 1991). No abuse of discretion will be found unless the defendant shows such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.* A defendant has the burden of showing an abuse of discretion. *State v. LeGrand*, 501 N.W.2d 59, 64 (Iowa Ct. App. 1993).

Diana contends that the district court abused its discretion in sentencing her to imprisonment rather than suspending her sentences and placing her on probation. In exercising its sentencing discretion, the district court must weigh all pertinent matters in determining a proper sentence, including the nature of the offense, the attending circumstances, and the defendant's age, character, and chance for reform. *State v.*

Thompson, 494 N.W.2d 239, 240 (Iowa 1992). Societal interests, such as general deterrence, are also relevant considerations. *State v. Ramirez*, 400 N.W.2d 586, 590. A sentencing court may also properly consider a defendant's truthfulness while testifying as probative of the defendant's attitude toward society and prospects for rehabilitation. *United States v. Grayson*, 438 U.S. 41, 50, 98 S. Ct. 2610, 2616, 57 L. Ed. 2d 582, 590 (1978). Each decision must be made on an individual basis, and no single factor alone is determinative. *Ramirez*, 400 N.W.2d at 590. The punishment should be one that fits both the crime and the individual. *State v. Goodson*, 503 N.W.2d 395, 398 (Iowa 1993).

Contrary to Diana's contentions, the district court's sentencing determination was not limited to a single consideration but instead focused on several factors. First, the district court took note of the seriousness of the offense. It recognized that the Giambellucas' actions had placed Dorothy's life in jeopardy and subjected her to pain and discomfort. The court also gave weight to societal interests, specifically mentioning its goal of deterring "not only . . . these defendants, but [also] others from committing acts of this nature." Finally, the court was influenced by its determination that "the defendants were less than candid in their testimony about the events . . . and are still somewhat prone to rationalize or attempt to rationalize their conduct or explain away their conduct rather than to be held accountable."

We find all of these considerations were relevant to determining Diana's sentence and contributed to the district court's decision to incarcerate her. While other factors may have militated in favor of probation, the district court properly weighed them against those favoring incarceration. As a result, we find no abuse of discretion. We affirm on this issue.

We next consider Diana's claim she was denied effective assistance of counsel. She specifically asserts her trial counsel misled her as to the consequences of her guilty plea, failed to conduct a full investigation, failed to ensure the accuracy and adequacy of her written guilty pleas, and failed to ensure she was advised of her rights. Diana further contends Iowa's nonsupport statute, Iowa Code section 726.5, is unconstitutionally void for vagueness and that her trial counsel should have objected to her guilty plea on the nonsupport charge on these grounds. Diana asks to have these issues preserved for postconviction proceedings. The State agrees that these issues cannot be adjudicated on the present record.

Diana's ineffective assistance of counsel claims come to us on direct appeal. Generally, we will not decide such claims on direct appeal as we prefer to reserve them for postconviction proceedings where counsel has an opportunity to respond. *State v. Taylor*, 310 N.W.2d 174, 179 (Iowa 1981). We depart from this preference if the record is adequate to evaluate appellant's claims. *State v. Schoelerman*, 315 N.W.2d 67, 71 (Iowa 1982). Where the record on direct appeal is not adequate to permit us to

resolve the issue, we preserve the defendant's claims for postconviction proceedings so the facts may be so developed. *State v. Koeninghain*, 356 N.W.2d 237, 238 (Iowa Ct. App. 1984). This gives the allegedly ineffective attorney the opportunity to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

We agree with the State that the record is inadequate for us to fully evaluate Diana's claims absent counsel's explanation for his conduct. Accordingly, we preserve Diana's ineffective assistance claims for postconviction proceedings. We affirm the decision of the district court.

AFFIRMED.