IN THE COURT OF APPEALS OF IOWA

No. 1999-470 (9-727) / 98-2102
Filed January 26, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JULIE ANN BLEVINS,
Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Shelby County, James M. Richardson, Judge.

Julie Blevins appeals from her sentence following a guilty plea to theft in the fourth degree in violation of Iowa Code section 714.2(4) (1997). **CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING.**

Drew H. Kouris, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Jeffrey L. Larson, County Attorney, and Susan Larson Christensen, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Zimmer and Vaitheswaran, JJ.

MAHAN, P.J.

Julie Blevins appeals from her sentence following a guilty plea to theft in the fourth degree in violation of Iowa Code section 714.2(4) (1997). She contends the trial court erred by failing to give sufficient reasons for the sentence and by failing to grant a less severe sentence. We affirm the conviction, vacate the sentence, and remand for resentencing.

In June of 1998, Blevins was charged with second-degree theft based on allegations she had misappropriated several thousands of dollars from her employer during May, June, and July of 1997. Blevins ultimately entered an *Alford* plea to a fourth-degree theft charge. Blevins agreed to pay restitution in the amount of $1,655.10. The State agreed not to resist a suspended sentence, but would not recommend a deferred judgment. The district court was not bound by the agreement.

An informal referral filed with the district court recommended probation and the payment of restitution. The record also shows Blevins, who was twenty-seven years old at the time of sentencing, had no prior criminal history and was a single, working parent.

At sentencing, Blevins requested a deferred judgment. The district court sentenced Blevins to one day less than one year in the county jail, with all but thirty days suspended, probation for one year, and adopted the restitution agreement of the parties. The district court also authorized Blevins to apply for work release. The district court stated:

> The Court has heard the counsel's arguments. The Court has examined the file. I have tried to structure my sentence in such a way so as not to minimize this particular charge and to allow the defendant

to rehabilitate herself through the use of probation as well as pay the court costs in a manner and restitution in a manner that is prompt but will allow some time for payment of same.

Blevins appeals.

I. Standard of Review. A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure, such as the trial court's consideration of impermissible factors. *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998). 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." *State v. Neary*, 470 N.W.2d 27, 29 (Iowa 1991).

II. Reasons for the Sentence Imposed. Blevins contends the trial court erred by failing to give sufficient reasons for the sentence. We agree.

We have previously stated:

> Under section 901.5, when considering authorized sentencing options, a court should consider:
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> > 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 addition, when determining a proper sentence, a court should consider the nature of the offense, the attending circumstances, and the defendant's age, character, and propensities or chances for reform. *State v. Johnson*, 476 N.W.2d 330, 335 (Iowa 1991).

State v. Harris, 528 N.W.2d 133, 135 (Iowa App. 1994).

The purpose of rule 22(3)(d) is to allow a reviewing court to determine whether there has been an abuse of discretion. *State v. Matlock*, 304 N.W.2d 226,

228 (Iowa 1981); *State v. Mickens*, 462 N.W.2d 296, 299 (Iowa App. 1990). 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. *State v. Garrow*, 480 N.W.2d 256, 259 (Iowa 1992). Failure to adequately state reasons for the sentence imposed requires us to vacate the sentence and remand the case for resentencing. *See State v. Taggart*, 525 N.W.2d 877, 882 (Iowa App. 1994) (citations omitted).

We find the statement of reasons made by the district court is inadequate for us to review its exercise of discretion or the concerns which motivated the selection of the sentence imposed. Therefore, we vacate the sentence and remand for resentencing.

III. Propriety of the Sentence. Although we have vacated the sentence and remanded for resentencing, we will consider Blevins' other claims. Blevins contends the trial court erred by failing to grant a less severe sentence. Specifically, she argues the district court did not consider what was in her best interest or in the best interest of society. She also argues the district court may have improperly considered the reduction of the charge from second-degree to fourth-degree theft. We disagree.

First of all, the measure of punishment selected by the district court lies within its sentencing discretion. *State v. Mai*, 572 N.W.2d 168, 170 (Iowa App. 1997) (citing *State v. Patterson*, 161 N.W.2d 736, 737 (Iowa 1968)). The sentencing court's duty is to consider all available sentencing options, give consideration to all circumstances of a particular case, and to exercise the

sentencing option which will best accomplish justice for society and for the defendant. *Mai*, 572 N.W.2d at 170 (citing *State v. Robbins*, 257 N.W.2d 63, 70 (Iowa 1977)). When a sentence falls within statutory limits it will only be set aside for an abuse of discretion. *Mai*, 572 N.W.2d at 170 (citing *Neary*, 470 N.W.2d at 29). A defendant's burden in overturning a sentence is a heavy one since district courts are in a superior position to assess and determine the appropriate sentence. *See State v. Luedtke*, 279 N.W.2d 7, 8 (Iowa 1979).

Secondly, Blevins argues the district court may have improperly considered the reduction of the charge from theft second degree to theft fourth degree. Our supreme court has stated, "[w]e will set aside a sentence and remand a case to the district court for resentencing if the sentencing court relied upon charges of an unprosecuted offense that was neither admitted to by the defendant nor otherwise proved." *State v. Sailer*, 587 N.W.2d 756, 762 (Iowa 1998) (quoting *State v. Black*, 324 N.W.2d 313, 315 (Iowa 1982)). This rule prohibits a sentencing court from imposing "a severe sentence for a lower crime on the ground that the accused actually committed a higher crime . . . even if the prosecutor originally charged the higher crime and reduced the charge." *Sailer*, 587 N.W.2d at 762 (quoting *State v. Thompson*, 275 N.W.2d 370, 372 (Iowa 1979)). "[I]n order to overcome the presumption the district court properly exercised its discretion, there must be an affirmative showing the court relied on . . . improper evidence." *Sailer*, 587 N.W.2d at 762 (quoting *State v. Dake*, 545 N.W.2d 895, 897 (Iowa App.1996)) (citations omitted).

Blevins was sentenced within the applicable statutory limits. *See* Iowa Code §§ 714.2(4) and 903.1(1)(b). The district court does not specifically refer to the

second-degree theft charge, Blevins merely speculates the district court may have been referring to that higher charge when it stated it was trying not to minimize "this particular charge." We have carefully reviewed the record in this case. We conclude Blevins has failed to make an affirmative showing the district court improperly relied upon an uncharged offense when sentencing her.

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING.