

IN THE COURT OF APPEALS OF IOWA

No. 9-174 / 98-0602

Filed April 30, 1999

STATE OF IOWA,

Plaintiff-Appellee,

vs.

KELLY GEORGE YOUNG,

Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

Defendant appeals from the judgment and sentence entered upon his conviction of operating while intoxicated (first offense) in violation of Iowa Code section 321J.2(2)(a) (1997). **AFFIRMED.**

John F. Fatino of Whitfield & Eddy, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney General, and Michelle Chenowith, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Streit and Zimmer, JJ.

PER CURIAM.

Defendant-appellant Kelly Young appeals the judgment and sentence imposed on his conviction of operating while intoxicated (first offense) in violation of Iowa Code section 321J.2(2)(a). He claims the district court abused its discretion in the sentence it imposed, and asserts the court erred in overruling his motion for judgment of acquittal because there was insufficient evidence to support his conviction. We affirm.

Young was observed by a police officer as he was driving near the Iowa State Fairgrounds. The officer had just received a report about someone driving a Cadillac as if intoxicated. The officer saw Young's Cadillac coming down the wrong side of the road with Young hunched over the steering wheel. When the officer stopped and turned around to follow, Young pulled into a driveway and got out of his car. The officer observed Young using the side of the car for balance. Young had bloodshot watery eyes, slurred speech, and smelled strongly of alcohol. Young failed three field sobriety tests administered by the officer. He was arrested for OWI and refused to provide a breath sample.

Young was charged with operating a motor vehicle while intoxicated (OWI). At trial, Young admitted having four mixed drinks about an hour before the stop, but disputed he was impaired. Two witnesses testified on Young's behalf concerning his demeanor and what he had drunk prior to the stop. The jury found Young guilty as

charged. The district court sentenced him to thirty days incarceration and imposed a \$500 fine.

Young first claims the district court abused its discretion in the sentence it imposed. He notes the State was recommending ten days incarceration and asserts the sentence imposed was more in line with an OWI third offense conviction. He also complains the court did not impose a rehabilitative sentence of substance abuse treatment, and suggests the court did not thoroughly evaluate all of the appropriate sentencing factors in imposing sentence. He further contends the court inappropriately considered the credibility of his witnesses and two prior OWI convictions which were more than ten years old in determining sentence.

Young next challenges the sufficiency of evidence supporting his conviction. He argues the testimony of the arresting officer was so discredited as to be ignored as a matter of law. He therefore asserts the district court erred in overruling his motion for judgment of acquittal.

The State responds the sentence was within the sentencing guidelines, the judge carefully considered appropriate factors in sentencing, and properly considered the factors Young claims to be inappropriate. Concerning the sufficiency of the evidence, the State responds the jury weighs credibility, not the district court nor the appellate courts. Therefore, the district court properly overruled Young's motion for judgment of acquittal.

Sentencing. Sentencing decisions are reviewed for an abuse of discretion. *State v. Garrow*, 480 N.W.2d 256, 259 (Iowa 1992). A court abuses its discretion when it exercises its discretion “on grounds or for reasons clearly untenable or to an extent clearly unreasonable.” *State v. Pappas*, 337 N.W.2d 490, 493 (Iowa 1993). “Ordinarily an abuse of discretion will be found only where there is no support for the decision in the record.” *State v. Gibb*, 303 N.W.2d 673, 687 (Iowa 1981). An abuse of discretion is rarely found when the sentence imposed falls within the statutory parameters unless the trial court fails to exercise its discretion, *e.g.*, *State v. Dvorsky*, 322 N.W.2d 62, 67 (Iowa 1982), or the trial court considers inappropriate matters in determining what sentence to impose, *e.g.*, *State v. Messer*, 306 N.W.2d 731, 732-33 (Iowa 1981).

The legislature has set forth twin goals of rehabilitation and protection of society. Iowa Code § 901.5; *State v. Wright*, 340 N.W.2d 590, 592 (Iowa 1983). The sentence imposed should be tailored for the individual defendant, with no single sentencing factor being determinative. *State v. Morrison*, 323 N.W.2d 254, 256 (Iowa 1982); *Dvorsky*, 322 N.W.2d at 67. Some of the factors to be considered by the court include the nature of the offense; the defendant’s age, character, and prospects for reform; the particular circumstances of the case; and the duty to protect society. *State v. Carey*, 306 N.W.2d 740, 742 (Iowa 1981).

In this case, the court explicitly considered a number of factors including Young’s past driving record, character letters from acquaintances, the danger Young

poses to society, his position in his local community, Young's prospect for rehabilitation, and the substance abuse evaluation. Iowa Code section 321J.2 defines OWI first offense as a serious misdemeanor and sets a minimum sentence at two days jail and a fine of not less than \$500. Section 903.1 sets the maximum sentence as one year imprisonment and a fine not exceeding \$1500. Although the jail sentence was above the minimum and above the State's ten-day recommendation, the district court did not abuse its discretion in setting the length of Young's jail time at thirty days nor in imposing the fine. The district court considered a variety of appropriate factors in tailoring the sentence to the individual defendant but did not consider inappropriate factors. Given the determination Young has a low probability of chemical dependency, the district court did not abuse its discretion in not ordering Young to participate in substance abuse evaluation and treatment. Under the circumstances of this case, the district court could reasonably conclude increased jail time and a fine might be more likely to make an impression on the defendant and lead to changed behavior than would participating in substance abuse evaluation and treatment.

Sufficient evidence. The standard of review is for errors at law. *State v. Phams*, 342 N.W.2d 792, 795 (Iowa 1983). A jury's guilty verdict is binding upon us unless we conclude the record lacks substantial evidence to support such a finding. *State v. Bush*, 518 N.W.2d 778, 779 (Iowa 1994). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993).

Substantial evidence does not, however, denote some elevated quantity of proof. *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994). Rather, the relevant question in our review of the case "is whether, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of facts could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984). Circumstantial evidence is just as probative as direct evidence. *State v. Parrish*, 502 N.W.2d 1, 3 (Iowa 1993); *State v. Garr*, 461 N.W.2d 171, 173 (Iowa 1990). We consider all the evidence at trial, not just the evidence that supports the verdict. *State v. Liggins*, 524 N.W.2d 181, 186 (Iowa 1994). A verdict is binding unless the finding is clearly against the weight of the evidence. *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981).

Young claims inconsistencies in the arresting officer's testimony should have caused the jury to conclude it was worthy of little belief. *See State v. Doss*, 246 Iowa 651, 652, 67 N.W.2d 451, 452 (1954) (stating a witness may be so discredited that his testimony is destroyed as a matter of law); *State v. Smith*, 508 N.W.2d 101, 103 (Iowa App. 1993). He argues no reasonable juror could be convinced Young was guilty beyond a reasonable doubt. *State v. Constable*, 508 N.W.2d 473, 478 (Iowa 1993).

The jury is in the best position to assess credibility. *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995); *State v. Hulbert*, 481 N.W.2d 329, 332 (Iowa 1992). It is the jury's duty to sort out the credibility of witnesses and place credibility where it belongs. *State v. Schertz*, 328 N.W.2d 320, 322 (Iowa 1982); *State v. McCullough*, 226 N.W.2d 216, 217 (Iowa 1975); *State v. Hawkins*, 519 N.W.2d 103, 104 (Iowa App. 1994); *State v. Trammell*, 458 N.W.2d 862, 863 (Iowa App. 1990). The jury may believe or disbelieve the testimony of witnesses as it chooses. *State v. Blair*, 347 N.W.2d 416, 421 (Iowa 1984); *Hawkins*, 519 N.W.2d at 104. It is the jury's duty to assign the evidence presented whatever weight it deemed proper. *Knox*, 536 N.W.2d at 742; *State v. Simpson*, 528 N.W.2d 627, 632 (Iowa 1995); *State v. Liggins*, 524 N.W.2d 181, 186 (Iowa 1994).

The testimony of the State's witnesses and of the defense witnesses was contradictory. Substantial evidence was presented in the State's case in chief from which the jury could conclude Young was guilty beyond a reasonable doubt. Evidence was presented in the defendant's case in chief from which the jury could conclude he was not guilty. It is the province of the jury to weigh the evidence and the credibility of the witnesses. Substantial evidence supports the verdict.

AFFIRMED.

No. 98-0602. [9-174] STATE v. YOUNG

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AFFIRMED. Considered by Sackett, C.J., and Streit and Zimmer, JJ. Per curiam.
(7 pages \$2.80)

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