

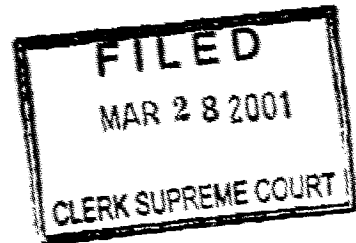
IN THE COURT OF APPEALS OF IOWA

No. 1-112 / 00-707
Filed March 28, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WAYNE EDWIN MORWITZER, JR.,
Defendant-Appellant.



Appeal from the Iowa District Court for Webster County, Kurt L. Wilke,
Judge.

Wayne Morwitzer appeals from his conviction and sentence following a guilty plea to possession of methamphetamine with intent to deliver, a class "B" felony, second or subsequent offense in violation of section 124.401(1)(b)(7) (1999). **AFFIRMED.**

Kurt John Stoebe, Humbolt, for appellant.

Thomas J. Miller, Attorney General, Donald D. Stanley, Jr., Assistant Attorney General, Ron Robertsen, County Attorney, and Stephen Lickiss, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink, and Zimmer, JJ.

ZIMMER, J.

Wayne Morwitzer, Jr. appeals from his conviction and sentence following a guilty plea to possession of methamphetamine with intent to deliver, a class "B" felony, second or subsequent offense in violation of section 124.401(1)(b)(7) (1999). Morwitzer contends the trial court (1) abused its discretion in refusing to grant his request for a one-third reduction in his mandatory minimum sentence, and (2) failed to state the rationale for refusing to grant his request for a one-third reduction in his mandatory minimum sentence. We affirm Morwitzer's conviction.

I. Background Facts and Proceedings. In April of 1999, the State filed an eight-count trial information against the defendant. Pursuant to a plea agreement, Morwitzer pled guilty in February of 2000 to the class "B" felony of possession of methamphetamine with intent to deliver, as a second or subsequent offender in violation of Iowa Code section 124.401(1)(b)(7) (1999). The State agreed to dismiss the seven other counts. During the plea proceedings, Morwitzer was advised that his sentencing judge would have the discretion to increase his sentence up to three times the twenty-five year sentence for a class "B" felony because he was an habitual offender under Iowa Code section 124.411(1). Morwitzer was further informed that under section 124.413 of the Code, he was subject to a mandatory minimum term of confinement of one-third the maximum indeterminate sentence prescribed by law.

At sentencing, the court declined the State's request to impose an enhanced sentence under section 124.411(1). The court also refused Morwitzer's request to reduce the one-third mandatory minimum sentence based

on his guilty plea, as authorized by section 901.10(2) of the Code. Instead, the district court sentenced Morwitzer to an indeterminate term of twenty-five years. Morwitzer appeals.

II. Scope of Review. We review the court's sentencing decision for an abuse of discretion. *State v. Laffey*, 600 N.W.2d 57, 62 (Iowa 1999). "An abuse of discretion is found only when the sentencing court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Privitt*, 571 N.W.2d 484, 486 (Iowa 1997). In applying its discretion, the court "should weigh and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of his reform." *State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979) (quoting *State v. Cupples*, 260 Iowa 1192, 1197, 152 N.W.2d 277, 280 (1967)). Iowa Rule of Criminal Procedure 22(3)(d) requires the court to state on the record its reason for selecting a particular sentence. This rule is satisfied if the court indicates which concerns motivated it to select the particular sentence imposed and those reasons are sufficient to demonstrate it exercised its discretion. *State v. Garrow*, 480 N.W.2d 256, 259 (Iowa 1992).

III. One-Third Reduction in Mandatory Minimum Sentence. Iowa Code section 901.10(2) allows the court, at its discretion, to reduce the mandatory minimum sentence required by section 124.413 by up to one-third. On appeal, Morwitzer argues the court unreasonably denied his request to reduce the minimum sentence by one-third because it did not take into account all pertinent factors. Morwitzer contends his request should have been granted

because he was thirty-five years old at sentencing and will not be eligible for parole until he is forty-three; he has three children and a wife to support and will not be able to do so in prison; and he admitted his wrongdoing and asked for help with his substance abuse problem. He alleges that the district court refused his request only because of his "extensive criminal history." He claims this was improper because the court only cited his prior drug offenses, which were an element of his offense because he was charged as a second or subsequent offender.

The district court is not required to specifically acknowledge each claim of mitigation urged by a defendant. *State v. Boltz*, 542 N.W.2d 9, 11 (Iowa Ct. App. 1995). Failure to acknowledge a particular factor does not mean it was not considered. *Id.* "Instead, we review a sentence for an abuse of discretion based on the entire record, and look to see if the reasons articulated by the trial court are sufficient to enable us to determine if an abuse of discretion occurred." *Id.*

While the court refused the defendant's request for a reduction in the mandatory minimum sentence, it also refused the state's request that Morwitzer be incarcerated for an enhanced term of forty years. In determining his sentence, the court reviewed the Presentence Investigation Report and weighed Morwitzer's chance of reform against the need to protect society. In doing so, the court properly considered the defendant's lengthy criminal history and his age. The Presentence Investigation Report reveals Morwitzer, at age thirty-five, had a criminal history that extended nineteen years and included non-drug related offenses. It also revealed Morwitzer had a substance abuse problem that had continued for over twenty years. The Report noted Morwitzer had failed

several substance abuse treatment programs. Based on this record, the court could properly conclude Morwitzer's chance for rehabilitation was slim. We conclude the district court properly exercised its discretion in denying defendant's request for a one-third reduction in his mandatory minimum sentence.

IV. Articulation of Sentencing Factors. Morwitzer next argues the court failed to articulate its rationale in determining his sentence. He contends the district court mentioned his prior drug offenses and the need to protect society, but failed to specifically state how denying his request for a reduction in the mandatory minimum sentence protects society. Morwitzer also complains that the court indicated it did not know whether his desire to help his family and reform were sincere, but did not specifically point to this as the reason for the denial in his mandatory minimum sentence.

While Iowa Rule of Criminal Procedure 22(3)(d) requires the court to state on the record its reasons for selecting a particular sentence, these reasons need not be detailed. *State v. Jacobs*, 607 N.W.2d 679, 690 (Iowa 2000). A succinct or terse statement of the court's reasons may be sufficient as long as it does not prevent us from reviewing the trial court's discretion. *Boltz*, 542 N.W.2d at 11. The sentencing court is not ordinarily required to articulate its reasons for denying a particular sentencing option. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996).

In this case, the sentencing court specifically rejected Morwitzer's request for a reduction in his mandatory minimum sentence. The court based its decision on defendant's extensive criminal history, skepticism regarding defendant's propensity for reform, his age and the need to protect society. We conclude the

district court gave adequate reasons for selecting its sentence and properly exercised its discretion in determining the sentence imposed.

V. Application of Apprendi. In his reply brief Morwitzer contends that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed.2d 435 (2000) applies to this case. He argues that any factors that increased the penalty for his crime had to be proven beyond a reasonable doubt. We do not ordinarily address issues raised for the first time in a reply brief. *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 642 (Iowa 1996). However, we do so briefly here as we find Morwitzer's argument has no merit.

Apprendi involves a New Jersey "hate crime" statute which provides for an extended term of incarceration if the trial judge finds by a preponderance of the evidence that the defendant in committing the crime acted with a purpose to intimidate a person because of race. *Id.* at ___, 120 S. Ct. at 2351, 147 L. Ed.2d at 442. Apprendi pled guilty to possession of a firearm, which subjected him to a sentence of five to ten years. *Id.* at ___, 120 S. Ct. at 2351-52, 147 L. Ed.2d at 442. In the event the court determined the hate crime statute applied, Apprendi's sentence could be doubled. *Id.* at ___, 120 S. Ct. at 2351, 147 L. Ed.2d at 442-43. After an evidentiary hearing, the sentencing court determined the hate crime statute applied and sentenced him to twelve years incarceration. *Id.* at ___, 120 S. Ct. at 2352, 147 L. Ed.2d at 443. On appeal, Apprendi argued that the Due Process Clause of the United States Constitution required that the finding of bias upon which his hate crime sentence was based be submitted to a jury. *Id.* at ___, 120 S. Ct. at 2352, 147 L. Ed.2d at 443. The Supreme Court agreed, holding "any fact that increases the penalty for a crime beyond the prescribed

statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at ___, 120 S. Ct. at 2362-63, 147 L. Ed.2d at 455.

A violation of Iowa Code section 124.401(b)(7) is a class "B" felony. Class "B" felonies are punishable by up to twenty-five years incarceration. Iowa Code § 902.9(1). Because Morwitzer pled guilty as a second or subsequent offender, he was eligible for imprisonment for a period not to exceed three times the term otherwise authorized; up to seventy-five years. Iowa Code § 124.411(1). However, against the recommendation of the State, the district court declined to increase Morwitzer's penalty and sentenced him to a twenty-five year, indeterminate term. The fact that could have increased the twenty-five year maximum penalty was Morwitzer's prior convictions. In *Apprendi*, the Supreme Court specifically excluded prior convictions as a fact that must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at ___, 120 S. Ct. at 2362-63, 147 L. Ed.2d at 455. Therefore, its holding cannot apply here. Furthermore, the district court declined to increase the maximum penalty altogether. Morwitzer's only complaint then is that he was not granted a reduction in the mandatory minimum sentence, a subject upon which the *Apprendi* holding has no bearing.

The district court had discretion in determining whether the mandatory minimum should be reduced. We find it did not abuse its discretion in refusing Morwitzer's request to reduce his sentence. We further find the court sufficiently stated its reasons for its sentencing decision on the record, allowing us to determine whether it had abused its discretion. Accordingly, we affirm.

AFFIRMED.