IN THE COURT OF APPEALS OF IOWA

No. 1-103 / 00-0608
Filed April 27, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Appellee,

vs.

JASON MICHAEL SEDLACEK,
Appellant.

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

Jason Michael Sedlacek appeals the district court's judgment and sentence, following his guilty plea, convicting him of two counts of third-degree sexual abuse in violation of Iowa Code section 709.4(c)(4) (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

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

Considered by Habhab, R. Peterson, and Honsell, Senior Judges.*

*Senior judges assigned by order pursuant to Iowa Code section 602.9206 (2001).

HABHAB, S.J.

Appellant Jason Michael Sedlacek appeals following his guilty plea, judgment, and sentence for two counts of sexual abuse in the third degree in violation of Iowa Code section 709.4(c)(4) (1997). We affirm.

On August 11, 1999, the State charged the defendant with Count I, sexual abuse in the second degree, for acts alleged on February 14, 1999, and Count II, sexual abuse in the third degree, for acts alleged between September 1, 1998, and October 31, 1998. Later, the State amended the trial information to charge Count I, sexual abuse in the third degree, and Count II, sexual abuse in the third degree; both counts were alleged to have occurred between December 2, 1998, and February 14, 1999. At all times material, the defendant was twenty-five years of age and the victim fourteen.

The defendant entered a guilty plea to two counts of sexual abuse in the third degree in violation of Iowa Code section 709.4(c)(4). He waived his right to file a motion in arrest of judgment and proceeded directly to sentencing. The defendant was sentenced to a term of incarceration not to exceed ten years for each count to be served concurrently.

On appeal, he contends the sentencing judge abused its discretion in considering an inappropriate factor when imposing the sentence. We disagree.

I. Review of sentencing for reliance on an improper consideration is properly before this court upon direct appeal despite the absence of objection in the trial court. *See State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994);

see also State v. Young, 292 N.W.2d 432, 434-35 (Iowa 1980) (improper factor claim reviewed despite lack of objection at sentencing).

Review is for correction of errors at law. Iowa R. App. P. 4. 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. Gonzalez*, 582 N.W.2d 515, 516 (Iowa 1998). In exercising its discretion, "the district court is to weigh all pertinent matters in determining a proper sentence including the nature of the offense, the attending circumstances, the defendant's age, character, and propensities or chances of reform." *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995) (quoting *State v. Johnson*, 513 N.W.2d 717, 719 (Iowa 1994)).

II. The defendant met the victim over the Internet in September 1998, falsely calling himself Jayson Voss and stating he was twenty-one years old. Factually, the defendant was twenty-five and the girl was thirteen. The defendant reported, "I got the impression she was a slut, for that reason, I wasn't attracted to her." According to the defendant, "[s]he fed me a line of crap She talked about . . . wanting to have sex with a friend without a relationship." Over the next two months, defendant engaged the girl in numerous sex acts, normally in his vehicle. In addition and about February 14, 1999, the defendant and a co-defendant, Nathan Hines, took the girl in Hines' van to a remote site where they engaged in multiple sex acts with her.

III. At the sentencing hearing, when the court asked the defendant what his age was at the time the sex acts took place, he replied he was twenty-five.

He then voluntarily and without explanation as to why he was making a statement stated that the sexual act was consensual and there was no force involved. The trial court quickly recognized a problem and properly responded, "Well, you realize, of course, that [force] is not required to be guilty of this." The defendant's counsel then explained that defendant interjected the issue of consent because he did not agree with statements to the contrary in the minutes of testimony.

The court then returned to the elements of the offense to which the defendant pled guilty. It stated: "So we're all absolutely clear on this, you [Sedlacek] had consensual sex with this 14-year-old girl?" and "Are the minutes of testimony substantially correct as they relate to the elements which I discussed with you earlier?"[1] Defendant answered affirmatively to both questions. The defendant was sentenced.

IV. The defendant on appeal now contends the district court relied upon an unproven, unprosecuted offense, namely second degree sexual abuse, and that no other facts support the court's view that defendant was minimizing his offense. We disagree.

Our supreme court has held that sentencing courts may not rely on additional, unproven, and unprosecuted charges when no facts before the court show the charges are valid and the defendant does not admit the additional charges. *State v. Sailer*, 587 N.W.2d 756, 762 (Iowa 1998). The fact the sentencing judge was merely aware of the uncharged offense is not sufficient to

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[1] The trial court carefully spelled out the elements of the offense which the defendant pleaded guilty to.

overcome the presumption that his discretion was properly exercised. *State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983). In order to overcome this presumption, there must be an affirmative showing that the judge relied on the uncharged offenses. *State v. Hansen*, 344 N.W.2d 725, 732 (Iowa Ct. App. 1983).

We conclude that defendant has failed to overcome the presumption that the trial court properly exercised its discretion. It is clear the trial court was aware of the second degree sexual abuse charge, but it is equally clear the trial court did not take that unproven charge into consideration when it sentenced the defendant. The trial court was quite adamant in disclaiming any thought or suggestion that it was going to take into consideration the dismissal of the second degree sexual abuse charge or any assertion that the sexual acts took place against the will of the victim.

We believe the trial court's statements at the time sentence was imposed best illustrate its position. After the defendant, his counsel, and counsel for Hines continued to object and emphasize that although there was an admission of sex acts with the under-aged victim, it was with her consent and was not done by force, the trial court had this to say:

> THE COURT: Well, I didn't say anything about [against the will or force] . . . . I don't know where you and [Sedlacek's attorney] are getting this idea that I'm—I'm trying to get against her will or force involved in this thing. * * * I certainly am not going to assume that a much more serious offense occurred and I want the record to be very clear on that. I know exactly to what the Defendants are pleading guilty and have pled guilty, and I'm going to sentence them for those crimes specifically and not something else.

After making this statement, the court imposed sentence. It stated:

> I believe that both of these Defendants are minimizing the seriousness of the offense. I believe that both Defendants should be sentenced to prison. I'm going to sentence them both to ten years in prison.

The court then explained its reasoning:

> 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.

Like the supreme court in *State v. Sailer*, 567 N.W.2d 756 (Iowa 1988), we firmly believe that these statements by the trial court illustrate the trial court knew its sentencing discretion was limited to the charges actually proven or admitted. There has been no showing the trial court considered impermissible factors in its imposition of sentence.

As an aside, the defendant in his brief states, "However, assuming arguendo that this court determines the district court did not consider the unproven charge, the record does not support the court's conclusion and reasoning for sentence." We again disagree.

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. In addition, the trial court provided for the record a list of additional reasons it considered in imposing the sentence. Our supreme court in *State v. Johnson*, 445 N.W.2d 337, 343 (Iowa 1989), has stated that, "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." The trial court properly exercised its discretion. We find no abuse.

Because we find no reversible error, we affirm.

AFFIRMED.