IN THE COURT OF APPEALS OF IOWA

No. 1-007 / 99-1696
Filed February 28, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY LAINE MCMULLEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Dale Ruigh and Carl E. Peterson, Judges.

Anthony McMullen appeals from his convictions and sentences for third-degree sexual abuse in violation of Iowa Code section 709.4 (1997) and lascivious conduct with a minor in violation of section 709.14. **AFFIRMED.**

Kermit L. Dunahoo of the Dunahoo Law Firm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Denise A. Timmins, Assistant Attorney General, Stephen Holmes, County Attorney, and Angelina Newman, Assistant County Attorney, for appellee.

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

ZIMMER, J.

The defendant, Anthony McMullen, pleaded guilty to sexual abuse in the third degree in violation of Iowa Code section 709.4 (1997) and lascivious conduct with a minor in violation of section 709.14. He now appeals the judgment and sentence entered upon his convictions, claiming the district court (1) accepted his guilty plea to lascivious conduct with a minor without a factual basis; (2) failed to advise him of his right to file a motion in arrest of judgment on the sexual abuse in the third-degree charge; and (3) abused its discretion when sentencing him by focusing solely on the nature of the offenses. We affirm.

I. Background Facts and Proceedings. On May 18, 1999, the State charged McMullen with sexual abuse in the third-degree, assault with intent to commit sexual abuse, and providing alcohol to an under age person. The charges were based upon acts that occurred in the fall of 1998 involving the defendant's step-daughter and her fifteen year old friend.

Pursuant to a plea agreement, McMullen appeared in open court on August 9, 1999 before Judge Dale Ruigh and pled guilty to sexual abuse in the third-degree and an amended charge of lascivious conduct with a minor. The trial court accepted the defendant's guilty plea to the lascivious conduct with a minor charge, but agreed to withhold acceptance of the plea to sexual abuse in the third-degree until the day of sentencing. It appears this was done to avoid bail ineligibility for McMullen following a guilty plea to the offense of third-degree sexual abuse.

The trial court advised McMullen of his right to file a motion in arrest of judgment on the lascivious acts charge. Because the court did not formerly

accept the defendant's plea to the sexual abuse in the third-degree charge, no arrest of judgment advisory was given regarding that portion of the guilty plea.

On October 25, 1999, the defendant appeared before Judge Carl Peterson for sentencing. The court formally accepted McMullen's previous guilty plea to sexual abuse in the third-degree and proceeded immediately to sentencing. The court, after considering and then rejecting a non-binding plea agreement, sentenced McMullen to a term not to exceed ten years and a fine of $500 on the sexual abuse charge. On the lascivious conduct charge, McMullen was sentenced to one year of confinement and fined $250. These sentences were ordered to run concurrently with one another. This appeal by McMullen followed.

II. Plea of Guilty to the Offense of Lascivious Conduct With a Minor. McMullen first contends there was no factual basis for his guilty plea to the offense of lascivious conduct with a minor. Any challenge to the adequacy of a guilty plea proceeding must be raised in a motion in arrest of judgment. Iowa R. Crim. P. 8(2)(d), 23(3)(a). The record reveals the district court informed McMullen of his right to file a motion in arrest of judgment after the court accepted his guilty plea to lascivious conduct with a minor. McMullen did not file a motion in arrest of judgment prior to sentencing on the lascivious conduct offense. Issues not raised before the district court cannot be raised for the first time on appeal. *State v. McCright,* 569 N.W.2d 605, 607 (Iowa 1997). McMullen's failure to move in arrest of judgment bars a direct appeal of his lascivious conduct conviction. *State v. Brooks,* 555 N.W.2d 446, 448 (Iowa 1996). Therefore, defendant has not preserved this issue for further review.

III. Motion in Arrest of Judgment Advisory. McMullen next contends his sex abuse conviction should be reversed because the trial court did not advise him of his right to file a motion in arrest of judgment before sentencing. The State concedes that if the trial court did not advise McMullen of his right to file a motion in arrest of judgment, then his failure to file a motion in arrest of judgment does not preclude challenges to his guilty plea to the sex abuse charge on appeal. *State v. Ludemann*, 484 N.W.2d 611, 612 (Iowa Ct. App. 1992).

The record reveals Judge Ruigh accepted McMullen's plea of guilty to the lascivious conduct charge, but withheld formal acceptance of his plea to the sex abuse charge pending sentencing. The trial court advised McMullen of his right to file a motion in arrest of judgment on the lascivious conduct charge but made no such advisory on the third-degree sexual abuse charge. It is apparent that this procedure was followed to allow defendant to remain on pre-trial release until the time of sentencing.

McMullen appeared for sentencing before a different judge. The sentencing court noted it could proceed to sentencing because there was no motion in arrest of judgment on file. The court then accepted McMullen's previously entered guilty plea on the sex abuse charge and proceeded to sentencing without objection. No judicial advisement of McMullen's right to file a motion in arrest of judgment was given in either the plea or sentencing proceedings regarding the sexual abuse charge.

Because the trial court failed to advise McMullen of his right to file a motion in arrest of judgment, he contends his conviction for third-degree sexual abuse should be vacated. We disagree. McMullen makes no claim of error in

his plea proceedings except for the court's failure to advise him of his right to file a motion in arrest of judgment. The purpose of Rule 8(2)(d) is to allow the trial court to correct defects in guilty plea proceedings before an appeal and thus eliminate the necessity for an appeal. *Wenman v. State,* 327 N.W.2d 216, 218 (Iowa 1982). Because McMullen claims no other defects in his guilty plea proceeding, we conclude the mere failure to inform him of his right to file a motion in arrest of judgment is harmless error and presents no issue for this court to review.

IV. Sentencing. McMullen last contends the trial court abused its discretion in sentencing him by focusing on the nature of his offenses and denying probation. 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 Code section 901.5 also requires the court to determine which sentence will provide the maximum opportunity for rehabilitation of the defendant, and for the protection of the community from further offenses by him and others.

Contrary to McMullen's contentions, we conclude the sentencing court did not focus solely on the nature of his offenses (adult sexual misconduct with a minor). The sentencing court was very candid with McMullen regarding its view of his actions. The court described McMullen's conduct as "reprehensible and disgusting." However, the court did not sentence McMullen based solely on the nature of the offenses to which he pled guilty. The court also discussed his prior criminal history, the harm done to his victims, the fact that the defendant used alcohol to help take advantage of minors, and the need to protect society from further offenses. We conclude the court's reasoning in selecting the sentences imposed was not clearly untenable or unreasonable and did not constitute an abuse of discretion.

We have considered all issues presented and conclude that the judgment and sentence of the district court should be affirmed.

AFFIRMED.