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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed November 29, 1982
vs.)
DAVID J. MUNZ,) 2-378/67753 133
Defendant-Appellant.)

Appeal from Dubuque District Court - T. H. Nelson, Judge.

Defendant appeals his indeterminate five-year sentence imposed upon his resentencing from an invalid determinate five-year sentence which was suspended. AFFIRMED.

Chris Odell, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Joseph P. Weeg, Assistant Attorney General, for plaintiff-appellee.

Considered en banc.

Defendant, David J. Munz, appeals his indeterminate five-year sentence imposed upon his resentencing from an invalid determinate five-year sentence which was suspended. We affirm.

After defendant pleaded guilty to OMVUI, third offense, and failed to file a motion in arrest of judgment, he was sentenced, on August 24, 1979, to an indeterminate five-year term of imprisonment. On September 12, 1979, pursuant to the shock sentencing provisions of Iowa Code section 902.4, defendant was ordered returned to the county for reconsideration of sentence. The hearing was held on October 25, 1979, following defendant's completion of an alcohol abuse treatment program. On that date, Judge Degnan sentenced defendant to a determinate five-year term of imprisonment, suspended the sentence, and placed defendant on probation.

On June 2, 1981, a probation violation report was filed. Following a preliminary probation revocation hearing, Judge Degnan filed an order finding that sufficient probable cause existed for a final revocation hearing.

Meanwhile, the State filed a motion to resentence defendant, contending that the sentence imposed on October 24, 1979, was illegal in that it was not an indeterminate sentence. On August 28, 1981, Judge Nelson ordered the previous sentence set aside as being invalid and ordered a resentencing hearing.

On September 3, 1980, Judge Nelson sentenced defendant to an indeterminate five-year term of imprisonment. The alleged probation violation by defendant was not discussed during the resentencing hearing, and no reasons were given at that hearing for the sentence imposed except defendant's "prior record." From that sentence defendant appeals.

I. Scope of Review. Our review is limited to assigned errors. Iowa R. App. P. 4.

II. New Sentence. Defendant argues that the trial court erred in sentencing defendant by failing to state on the record the reasons for imposing an increased sentence following vacation of the invalid sentence. He argues specifically that trial court failed to comply with Iowa Rule of Criminal Procedure 23(3)(d) and that it gave no reason for the imposition of a more severe sentence within the import of North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). The State argues that trial court complied with rule 23(3)(d) and that Pearce is inapplicable to the present situation. We affirm the trial court.

A. Rule 23(3)(d). Rule 23(3)(d) provides in part that "the Court shall state on the record its reasons for selecting the particular sentence."

> The main purpose of the requirement in rule 22(3)(d) that a Court state its reason for a particular sentence is to allow us to review the sentence to determine if there has been an abuse of discretion. Other practical considerations in requiring a statement of reasons are as follows: a good sentence is one which can reasonably be explained; knowing why the court imposed a particular sentence is of value to corrections authorities; and the explanation has a possible therapeutic effect on a defendant, ...

State v. Matlock, 304 N.W.2d 226, 228 (Iowa 1981).

In the present situation the resentencing order was, in part, as follows:

> After receiving and examining all pertinent information, the Court has considered the sentencing options of deferred judgment, deferred sentence, fine, suspended sentence, confinement or any combination thereof all as authorized by law and has decided to confine the Defendant, in part, because of: prior record.

The State concedes that the court's statement is brief and that it would have been better if the court had elaborated on the reason but, argues that rule 23(3)(d) was still satisfied. The supreme court in State v. Victor, 310 N.W.2d 201 (Iowa 1981), confronted a sentencing order of similar format stating "[the court] has decided to confine the defendant, in part, because of: nature of the offense." Id. at 205. In Victor, the court stated:

> The brevity of the court's statement of reasons here does handicap our review of the sentencing discretion. And it probably would have been more meaningful to the defendant if the trial court had repeated from the minutes of testimony some description of the brutal violence of the crime and the serious effect it had on the victim and also on the public. Yet, it is clear from the trial court's statement exactly what motivated and prompted the sentence. We find that the requirement to state reasons for the sentence was satisfied.

In the present situation, the court merely stated "prior record" as its reason for the sentence. Defense counsel recognizes that a trial court in resentencing a defendant may legitimately consider the conduct of the accused subsequent to the original conviction and sentence. While we do not condone the practice of the trial court in this matter, especially since, as the supreme court has recognized, such brevity does "handicap our review," we do not find the court's limited statement to be fatal to the sentencing. A more detailed statement of reasons would be more consistent with the stated purposes of rule 23(3)(d) since: "a good sentence is one which can reasonably be explained; knowing why the court imposed a particular sentence is of value to corrections authorities; and the explanation has a possible therapeutic effect on a defendant . . . ." State v. Matlock, 304 N.W.2d at 228.

B. Applicability of Pearce. Defendant argues that the trial court should state additional reasons for the imposition of a greater sentence than that originally imposed on the basis of North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). The State argues that Pearce is inapplicable. We agree with the State.

Pearce involved a conviction which had been set aside and a new trial ordered. It was determined by the Court that a more severe sentence could be imposed in resentencing without violating equal protection, but that due process required that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new

trial." Id. at 725, 89 S. Ct. at 2080. 23 L. Ed. 2d at 669. To prevent any vindictiveness, the trial court must state its reasons for the harsher punishment. Id. at 726, 89 S. Ct. at 2081, 23 L. Ed. 2d at 770.

The Pearce case is distinguishable on various grounds. Unlike the Pearce case, defendant here does not allege a constitutional question. Further, there has been but one conviction of the defendant; only the sentence originally imposed was improper. This is not a case where a conviction has been set aside and the potential ire of the judiciary raised. Rather, we find the present sentence, which replaces an improper sentence not to be a product of vindictiveness. Accordingly, we affirm the trial court.

AFFIRMED.