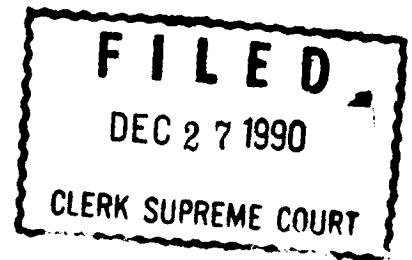


IN THE COURT OF APPEALS OF IOWA

No. 0-393 / 89-1623



STATE OF IOWA,

Appellee,

vs.

RONALD LEE ROYER,

Appellant.

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Appeal from the Iowa District Court for Washington County, Daniel F. Morrison, Judge.

Defendant appeals from his conviction and sentence following a guilty plea. He contends the trial court erred in basing the choice of sentence in part on his failure to pay a fine arising from an unrelated 1982 incident.

AFFIRMED.

Linda Del Gallo, Acting State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Mark Joel Zbieroski, Assistant Attorney General; and Gerald Partridge, County Attorney, for appellee.

Considered by Schlegel, P.J., and Hayden and Habhab, JJ.

HABHAB, J.

Ronald Royer entered a plea of guilty to a charge of possession of marijuana. The district court imposed a sentence of 180 days in jail. The court then suspended ninety days of this sentence and placed Royer on probation for two years, subject to various conditions. One of the conditions was that Royer pay a \$2,000 fine which had been imposed on him in 1982 for an unrelated conviction. (During the sentencing hearing the court questioned Royer about the reasons why he had never paid the 1982 fine; Royer responded that he had tried to make small payments on the fine when possible, but that he was seldom able to do so because he was usually unemployed.)

On appeal, Royer contends that the inclusion of the 1982 fine is unconstitutional and claims the court could not consider the fact that the fine was unpaid or make it a condition of probation.

A sentencing court's decision will be reversed only upon a finding of abuse of its discretion. State v. Akers, 435 N.W.2d 332, 335 (Iowa 1989). This appears only when it is demonstrated that the discretion was exercised only on grounds or for reasons clearly untenable or to an extent clearly unreasonable. State v. Zaruba, 306 N.W.2d 772, 774 (Iowa 1981).

Upon a thorough review of the record, we find no abuse of discretion by the trial court and affirm the sentence in its entirety.

In determining whether to suspend sentence, the Iowa Code requires that the sentencing court "consider the age of the defendant; the defendant's prior record of convictions and prior record of deferments of judgment if any; the defendant's employment circumstances; the defendant's family circumstances; the nature of the offense committed; and such other facts as are appropriate." Iowa Code § 907.5 (1989). The record reveals the judge took notice of the defendant's prior record, which included the fine he had failed to pay when setting sentence.

The defendant contends the court improperly imposed payment of the 1982 fine as a condition of probation.¹ Additionally, the defendant suggests that although a judge may impose any reasonable conditions while determining probation, the condition imposed by the court was unreasonable in light of the defendant's indigence. We disagree.

Conditions of probation have been approved by the Iowa Supreme Court similar to the one in question. In State v. Rogers, the supreme court held that a probationer could be ordered as a term of probation to reimburse the county for court appointed counsel fees expended in his behalf. State v. Rogers, 251 N.W.2d 239, 246 (Iowa 1977). Also, in a similar case, the court approved an order requiring the

1. The trial court at the time of sentencing informed the defendant that he wanted him to get "serious" about paying the fine.

probationer, as a term of probation, to repay to the state the public money spent to buy illicit drugs the probationer was convicted of delivering. State v. Zaruba, 306 N.W.2d 772, 775 (Iowa 1981).

The supreme court has upheld orders which require the defendant to pay restitution despite indigence, when the defendant was in good health and had skills which would enable him to earn income. State v. Kaelin, 362 N.W.2d 526, 528 (Iowa 1985). In this case, the trial court took notice of the fact that the evidence suggested the defendant was in good health and good physical condition. Further, there was no evidence to indicate that defendant ever attacked the previous order due to an inability to make payments. He also determined the defendant had not been serious about paying the fine. In either event, the question here is merely whether the court as a condition of probation can require the defendant to pay an existing fine. We hold that it can. Whether the failure to pay the fine may result in incarceration or the revocation of his parole will have to await another day.

Based upon our reading of the relevant supreme court holdings coupled with the evidence presented, we find no abuse of discretion by the trial court and affirm the sentencing order.

AFFIRMED.

Schlegel, P.J., concurs; Hayden, J., specially concurs.

HAYDEN, J. (specially concurring)

The majority opinion is correct, as far as it goes. The sentencing court imposed payment of a \$2,000 fine from a previous conviction in 1982 as a condition of probation for the present conviction. The sentencing court suspended 90 days of Royer's sentence conditioned upon payment of the previously imposed fine. This is clearly unconstitutional.

No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in case of fraud, and no person shall be imprisoned for a militia fine in time of peace.

Iowa Const. art. I, § 19.

However, it does violate the constitutional prohibition [on imprisonment for debt] to suspend a sentence on the condition that defendant pay obligations unrelated to the criminal act for which he has been convicted.

16A C.J.S. Constitutional Law § 490 (1984).

Although Royer does raise constitutional issues on this appeal, he failed to raise the Iowa constitutional prohibition on imprisonment for debt. The sentence imposed is clearly unconstitutional under that section.

Since this particular argument was not raised on appeal, we cannot reverse. However, Royer still has his opportunity for postconviction relief for ineffective assistance of appellate counsel.

Subject to this observation, I concur in the majority opinion.