IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

No. 1-449 / 00-1328
Filed November 16, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROY LYNN FRANKLIN,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mary E. Howes, District Associate Judge (trial), and Jack F. Broderick, Senior Judge (sentencing).

Defendant appeals from the judgment and sentence entered upon his conviction for third-offense operating while intoxicated. **CONVICTION AFFIRMED; SENTENCE VACATED; AND CASE REMANDED FOR RESENTENCING.**

James L. Tappa of Spector, Tappa & Nathan, Rock Island, Illinois, for appellant.

Thomas J. Miller, Attorney General, Darrel L. Mullins, Assistant Attorney General, William E. Davis, County Attorney, and Robert C. Bradfield, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Hecht and Vaitheswaran, JJ., but decided by Huitink, P.J., and Mahan, Hecht, and Vaitheswaran, JJ.

PER CURIAM

Defendant Roy Lynn Franklin appeals from the judgment and sentence entered upon his conviction for third-offense operating while intoxicated in violation of Iowa Code section 321J.2(1)(a) (1999). He contends the district court erred in concluding there was sufficient evidence to convict him. Franklin also argues the district court abused its discretion in sentencing him to the maximum jail term by (1) failing to inform him of the mandatory minimum jail sentence of thirty days and a minimum fine of $2500; and (2) failing to mention the factors it considered in sentencing him. We affirm Franklin's conviction, vacate the sentence, and remand the case for resentencing.

Background Facts and Proceedings. At approximately 7:30 p.m. on December 28, 1999, Franklin left his friend's home in Davenport and drove toward his home. Iowa State Trooper Joseph Ehler was approaching from the opposite direction and clocked Franklin's vehicle at fifty-five miles per hour in a forty-five miles per hour speed zone. Trooper Ehler turned around and followed Franklin. Trooper Ehler activated his in-car video camera, which captured Franklin's driving. After observing Franklin's vehicle repeatedly weave within his lane, Trooper Ehler initiated a traffic stop. Franklin made "furtive movements" within his vehicle when he was stopped. Trooper Ehler approached the vehicle and detected a strong odor of alcohol emanating from Franklin, observed his speech was mumbled, and his eyes were watery, red, and bloodshot. Trooper Ehler also saw an open container of alcohol, a can of beer, in the vehicle. When

asked if he had been drinking, Franklin admitted he had consumed a couple of beers.

At Trooper Ehler's request, Franklin attempted several field sobriety tests including the horizontal gaze nystagmus test, the one-leg stand test, and the walk-and-turn test. After observing the tests, Trooper Ehler believed Franklin failed two of the three field sobriety tests. Even though he passed the one-leg stand test, Franklin was unable to keep his balance on two separate occasions during the administration of the test. Trooper Ehler then requested Franklin to submit to a preliminary breath test, which he failed. Franklin was then arrested and transported to the Scott County jail. When tested on the Intoxilyzer 4011A machine, his blood alcohol content was measured at 0.10, which was within the inherent margin of error of the intoxilyzer, and thus was inadmissible at trial.

On January 11, 2000, the State charged Franklin with third-offense operating while intoxicated (OWI) in violation of Iowa Code section 321J.2(1)(a).[1] Franklin waived his right to a jury trial and on June 29, 2000, the district court entered its ruling and legal conclusions finding Franklin guilty of OWI, third-offense. On August 4, 2000, Franklin was sentenced to an indeterminate, five-year term of imprisonment and a $2500 fine. Franklin appeals.

Sufficiency of the Evidence. Franklin contends there was insufficient evidence to support his conviction for OWI, third-offense. We review challenges to the sufficiency of evidence for errors at law. *State v. Button,* 622 N.W.2d 480,

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[1] Franklin was also charged with possessing an open container of alcohol in a motor vehicle, a simple misdemeanor, in violation of Iowa Code section 321.284. The district court dismissed the charge at sentencing.

483 (Iowa 2001). In a jury-waived trial, the court is the fact finder. *State v. Sinclair*, 622 N.W.2d 772, 778 (Iowa Ct. App. 2000). "We review a trial court's findings in a jury-waived case as we would a jury verdict: If the verdict is supported by substantial evidence, we will affirm." *Id.* Substantial evidence means evidence that could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *Id.*

In deciding whether there is substantial evidence, we view the record in a light most favorable to the State. *Id.* All evidence is considered, not merely the evidence supporting the verdict. *Id.* Direct and circumstantial evidence are equally probative. *Id.* A verdict can rest on circumstantial evidence alone. *State v. Shortridge*, 589 N.W.2d 76, 80 (Iowa Ct. App. 1998). The inferences to be drawn from the proof in a criminal case must "raise a fair inference of guilt as to each essential element of the crime." *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992). Evidence is not substantial if it raises only suspicion, speculation, or conjecture. *Id.*

The offense of operating while intoxicated consists of two essential elements: (1) the operation of a motor vehicle; (2) while "under the influence"[2] of alcohol. Iowa Code § 321J.2. Franklin contends the evidence presented by the State was insufficient to prove the second element. We disagree.

The State introduced substantial evidence to support a finding Franklin

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[2] A person is "under the influence" when one or more of the following is true: (1) the person's reason or mental ability has been affected; (2) the person's judgment is impaired; (3) the person's emotions are visibly excited; and (4) the person has, to any extent, lost control of bodily actions or motions. *In re S.C.S.*, 454 N.W.2d 810, 814 (Iowa 1990).

was operating while intoxicated. Franklin admitted at trial to consuming alcohol before driving. Trooper Ehler observed all the classic signs of intoxication. He detected a strong smell of alcohol emanating from Franklin, his speech was mumbled, and his eyes were bloodshot, red, and watery. There was also an open container of alcohol, a can of beer, in his vehicle. Franklin failed two of the three field sobriety tests. In addition, Trooper Ehler observed Franklin swerving in his lane and driving fifty-five miles per hour in a forty-five-mile per hour zone. Based on this evidence, a reasonable finder of fact could have found Franklin to be under the influence of alcohol beyond a reasonable doubt.

Viewing all the evidence in the light most favorable to the State, we find Franklin's conviction supported by substantial evidence in the record, and affirm the district court on this issue.

Sentencing. In reviewing Franklin's challenges of the district court sentence, we review for abuse of discretion. *State v. Duckworth*, 597 N.W.2d 799, 800 (Iowa 1999). Such abuse will only be found if the district court's discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

A. Failure to State Adequate Reasons for Sentence.

Iowa Rule of Criminal Procedure 22(3)(d) requires a sentencing court to "state on the record its reason for selecting the particular sentence." Failure to state on the record the reasons for the sentence imposed requires the sentence be vacated and the case remanded for amplification of the record and resentencing. *State v. Mai*, 572 N.W.2d 168, 170 (Iowa Ct. App. 1997). "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." *State v. Johnson,* 445 N.W.2d 337, 343 (Iowa 1989). The district court must demonstrate its exercise of discretion by stating upon the record the reasons for the particular sentence imposed. *State v. Thomas,* 547 N.W.2d 223, 225 (Iowa 1996). In applying 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. The courts owe a duty to the public as much as to defendant in determining a proper sentence. The punishment should fit both the crime and the individual.

State v. August, 589 N.W.2d 740, 744 (Iowa 1999).

Our supreme court has stated the above factors are some of the "minimal essential factors" to be considered when exercising sentencing discretion. *State v. Hildebrand,* 280 N.W.2d 393, 396 (Iowa 1979). "The nature of the offense alone cannot be determinative of a discretionary sentence." *State v. Dvorsky,* 322 N.W.2d 62, 67 (Iowa 1982). In determining whether the district court considered pertinent matters in imposing a particular sentence, we look to all parts of the record to find supporting reasons. *State v. Boltz,* 542 N.W.2d 9, 11 (Iowa Ct. App. 1995). The record includes not only reasons stated during the sentencing hearing, but also reasons given in the written judgment entry. *State v. Lumadue,* 622 N.W.2d 302, 304 (Iowa 2001).

In this case, the district court stated the following in sentencing Franklin:

> As I have indicated, I have reviewed the report and the recommendation, the Defendant's past record. There seems to be no question but that this is the third such offense. I am – after

> reviewing this – I am inclined to follow the investigation report and adopt the findings of fact as they have been presented there subject to corrections made as to the names of the parties, prosecutor and judge and the amount of assets, which is immaterial to this matter anyway. So I will sentence the defendant to be placed in the custody of the Department of Adult Corrections for a period not to exceed five years. I will designate the Davenport OWI facility as the point of reception in this mater. Furthermore, the defendant will be sentenced to pay a fine of $2,500.00 plus court costs and surcharge, and defendant's driver's license or opportunity to obtain a driver's license will be suspended for a period of six years.

Whether the court properly exercised its sentencing discretion is measured by its reasons stated in support of the sentence imposed and not by the simple fact the court acknowledged the receipt and review of a presentence investigation report or inquiry concerning the accuracy of its content. What is missing in this case is "a rationale relating to *this* offense, and *this* defendant's background." *Lumadue,* 622 N.W.2d at 305. In the absence of such references, we are unable to say the district court discharged its duty to weigh all pertinent matters in determining the proper sentence to impose in this case. We therefore find the district court's failure to state adequate reasons for the sentence was an abuse of discretion. Accordingly, we vacate the sentence and the case is remanded for resentencing.

B. Remaining Issues.

Because we have vacated the sentence and remanded for resentencing, we need not address the remaining issues raised by Franklin in his appeal.

CONVICTION AFFIRMED; SENTENCE VACATED; AND CASE REMANDED FOR RESENTENCING.