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IN THE COURT OF APPEALS OF IOWA

WILLIAM VICTOR POWELL,)
Appellant,) Filed May 20, 1977
v.)
STATE OF IOWA,) 141
Appellee.) 2-57910

Appeal from Lee District Court - Ira F. Morrison, Judge.

Appeal from denial of application for postconviction relief asserting that appellant's sentence was motivated by patterned and customary sentencing policies imposing a greater sentence upon defendants who do not plead guilty. Affirmed.

Gordon E. Allen of the Iowa Civil Liberties Union, for appellant.

Richard C. Turner, Attorney General, and Lorna Lawhead Williams, Assistant Attorney General, for appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

This is an appeal from a judgment denying the application of appellant, William Powell, for postconviction relief. We affirm.

The application alleges that there has developed a patterned and customary sentencing policy in the Lee County District Court whereby those persons convicted of the public offense of escape by jury trial receive more severe sentences than those persons convicted of the same offense upon pleas of guilty. Powell pled not guilty to a charge of escape from the state penitentiary and was convicted by a jury. On October 29, 1973, Powell received the maximum sentence of five years to commence upon expiration of his existing sentences. Statistical data offered at the post-conviction hearing established that of the 98 persons who pled guilty in the Lee District Court to the crime of escape during the period January 1, 1968 through December 31, 1973, two received a five year sentence, two received a two year sentence, and 94 received a three year sentence. For the same period the data reflects that of the six persons who pled not guilty to the crime and were convicted, three received a sentence of five years, two received a four year sentence, and one received a sentence of one year.

The postconviction application asserts that in view of the foregoing sentencing pattern the trial court should not have imposed a sentence upon Powell greater than the three year sentences customarily imposed for this crime without accompanying said sentence with an affirmative statement of reasons why the patterned and customary period was exceeded. It is contended that such statement is necessary to assure the absence of unconstitutional motivation, *i.e.*, punishing the defendant for exercising his constitutional right to jury trial. Failure to set forth this affirmative statement of reasons is claimed to be violative of

Powell's rights guaranteed by the due process clause and equal protection clause of the fourteenth amendment to the United States Constitution and article I, section 9 of the Constitution of the State of Iowa.

The trial court in denying the application found:

> "That no judicial agreement expressed or implied nor no patterned and customary sentencing policy exists or existed in Lee County for escapees who exercised their right to stand trial."

This finding was based upon the testimony of the four district court judges, who preside over most of the criminal proceedings in Lee County, denying the existence of any such policy. One of these judges, Judge D. B. Hendrickson, imposed the sentence upon Powell which is the subject of this postconviction proceeding.

The trial court further found:

> "It is also quite clear that the trial court sentenced the applicant on an individual basis."

and

> ". . . that he did not give weight to the fact that applicant pled not guilty and that the prime motivation of the five year sentence imposed was the factor of deterrence, . . ."

This finding fully accords with the testimony of Judge Hendrickson given at the postconviction hearing.

I. If Powell were asking the postconviction court to adjudicate whether or not his sentence was free from "unconstitutional motivation" he would be required to show more than what the general practice was. To paraphrase State v. Jackson, 204 N.W.2d 915, 916 (Iowa 1973);

> "The problem has two parts. Is the general [practice] valid?

and

> "Did the trial court in fact sentence defendant under [such practice]."

But Powell's application does not ask the postconviction court to determine whether his sentence was the product of "unconstitutional motivation." Rather, the relief which Powell requests in his postconviction application is simply that he be resentenced and if his sentence exceeds the three year sentences which in most instances are given to escapees who plead guilty, that it be accompanied by an affirmative statement of reasons sufficient to "assure the absence of unconstitutional motivation." As authority for this relief, Powell relies upon North Carolina v. Pearce, 395 U.S. 711 (1969) and People v. Snow, 194 N.W.2d 314 (Mich. 1972).

We believe Powell's reliance on these authorities is misplaced. Both of these cases involve claims of improper sentencing motives which were presented on direct appeal from the sentence. In such instances the appellate court did not have the sentencing judge's reasons for sentencing before it and remanded the cases for resentencing so that information could be entered on the record by the trial judge. In this postconviction proceeding this is not required. The sentencing judge's motivation in the sentencing of Powell was fully developed in the hearings before the trial court. We believe the trial court's findings with respect thereto serve to defeat Powell's claim to the relief which he requests.

Cases decided by the Supreme Court since North Carolina v. Pearce, supra, indicate quite clearly that resentencing with an affirmative statement of reasons is not the only acceptable method of dispelling claims of improper sentencing motives. *See*, Moon v. Maryland, 398 U.S. 319 (1970); (trial judge's reasons supplied by affidavit filed in appellate court); Odom v. United States, 400 U.S. 23 (1970) (trial judge's reasons supplied in supplemental order in trial court entered after certiorari granted by Supreme Court). We therefore conclude that the postconviction

trial court in the present case had sufficient evidence, including the testimony of Judge Hendrickson to finally adjudicate Powell's claims adversely to him without the necessity of ordering a resentencing. The trial court's findings in this regard find complete support in the record and we do not disturb them.

II. In oral argument before this court counsel for Powell contended that the reasons given by Judge Hendrickson at the postconviction hearing for sentencing Powell to the maximum sentence of five years were legally insufficient. This claim is not the same as that advanced in the trial court that improper consideration was given to the fact that Powell stood trial. We have previously concluded that such improper motive on the part of the sentencing judge has been sufficiently negated by the State. Now it is contended by Powell that the trial court's motivation was improper for another reason, *i.e.*, that the deterrent factor involved was overemphasized in imposing the maximum sentence.

We do not consider this proposition on the merits as it has not been timely raised. *See, e.g.*, State v. Ritchison, 223 N.W.2d 207, 213 (Iowa 1974); Pose v. Roosevelt Hotel Co., 208 N.W.2d 19 (Iowa 1973); Patz v. Farmegg Products, Inc., 196 N.W.2d 557 (Iowa 1972). We believe that some explanation of the sentencing judge's emphasis of the deterrent factor may be found in the fact that the record shows that this was Powell's second conviction for escape. The record does not disclose what the sentence was on the first conviction. Considerations relating to deterrence could well be viewed as militating towards a greater sentence for the second conviction had the sentence on the first conviction been less than the maximum and no less than the prior sentence if it had been the maximum.

We have considered all issues and find no basis for reversal.

AFFIRMED.