IN THE COURT OF APPEALS OF IOWA

No. 1999-381 (9-634) / 98-2084
Filed December 27, 1999

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

VINTON ORVILLE CARMER II,
Defendant-Appellant.

Appeal from the Iowa District Court for Marshall County, Dale D. Ruigh, Judge.

Vinton Orville Carmer II appeals the consecutive sentences imposed upon his guilty plea to first-degree burglary and willful injury. He also claims his counsel provided ineffective assistance. **AFFIRMED.**

Tiffany Koenig, Des Moines, for appellant.

Thomas J. Miller, Attorney General, **Linda J. Hines,** Assistant Attorney General, **and James DeTaeye,** County Attorney, **for appellee.**

Considered by Huitink, P.J., and Mahan and Hecht, JJ.

HECHT, J.

Defendant-appellant, Vinton Carmer II, appeals the sentences imposed after his guilty plea to first-degree burglary and willful injury. Carmer claims the district court abused its discretion in ordering consecutive sentences and his counsel provided ineffective assistance when he failed to present all mitigating evidence at the sentencing hearing. We affirm.

Factual setting. In July 1998, Carmer, then age seventeen, and Gerald Smith broke into Bruce Wolken's apartment to steal his TV and VCR. During the burglary, Wolken was struck several times with a crow bar, stabbed in the chest, and his throat was slit. Carmer and Smith returned to the apartment when they discovered they had taken the wrong remote control. Twenty-seven hours later, Wolken's neighbor found him bleeding on his bed after he would not answer his door. After police received information Smith and Carmer had been bragging about committing a burglary and cutting a man's throat, the two were arrested. Carmer was initially charged with burglary in the first degree and attempted murder. After negotiations, he plead guilty to first-degree burglary and willful injury. At the plea hearing, Carmer testified he only stood outside the apartment as a lookout and did not injure Wolken. The minutes of testimony filed state Smith would testify Carmer stabbed Wolken and slit his throat.

Sentencing proceeding. At the sentencing hearing, Carmer's attorney called Carmer's mother to testify to his remorse and that he was a "follower". Carmer also

spoke, apologizing to the victim's family and expressing his remorse. Counsel argued eloquently for concurrent sentences by emphasizing Carmer's remorse, his limited role in the crime (Carmer claims he was outside of the apartment at the time of the stabbing), his role as a follower, his psychiatric history, and his turbulent childhood. The pre-sentence investigation detailed Carmer's troubled past, his prior psychiatric evaluations and treatment, and personal history. The judge indicated Carmer was very involved in the crime, and he needed a long time to receive services and counseling so he would not commit another crime. He noted past interventions had not prevented Carmer's involvement in "these very, very serious crimes." Based on the factors cited, the judge sentenced Carmer to consecutive sentences.

Claims on appeal. Carmer first claims, considering his age, his turbulent past, his role as a follower, his remorse, and his limited role in the crime, the judge abused his discretion in imposing consecutive sentences. Carmer also claims his counsel provided ineffective assistance by not presenting all relevant information to support the argument for concurrent sentences. Carmer argues counsel should have presented a more detailed account of Carmer's troubled past, and he should have called more witnesses to testify concerning Carmer's remorse, involvement in the crimes, state of mind, and his attitude.

Discussion. Sentencing decisions will be upheld unless a defendant demonstrates the court abused its discretion, considered impermissible factors, or there was some defect in the sentence or proceeding. No abuse of discretion is found

unless the court "exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999). The transcript of the sentencing proceeding clearly shows the judge considered the factors which Carmer complains were not presented sufficiently and did not consider impermissible factors. A plain reading of the court's statements reveals the court's careful, well-reasoned exercise of discretion, not an abuse of discretion. The court, in particular, noted the need for a lengthy period of time for treatment and other services and to protect the public from such depraved acts. We affirm the court's imposition of consecutive sentences.

Carmer also claims his trial counsel was ineffective in not calling more family members to testify concerning Carmer's remorse and in not calling witnesses, such as the doctors who made the diagnoses detailed in the pre-sentence investigation. We review claims that trial counsel was ineffective de novo. *See State v. Howell*, 557 N.W.2d 908, 913 (Iowa App. 199). When a defendant relies on a specific act or omission to prove ineffective assistance of counsel, two conditions must be demonstrated: "It must be shown that (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *Snethen v. State*, 308 N.W.2d 11, 14 (Iowa 1981). Carmer cites no authority to show counsel had a duty to call all the witnesses he now argues should have been called. The court had the pre-sentence investigation which provided ample information concerning Carmer's psychiatric, family, and criminal history. Both Carmer and his mother testified about his remorse. Having

additional witnesses testify concerning Carmer's history or his remorse would have been cumulative. Withholding cumulative testimony does not demonstrate sufficient prejudice. *See Schrier v. State*, 347 N.W.2d 657, 664 (Iowa 1984). We find Carmer has failed to demonstrate either of the necessary conditions to show his trial counsel was ineffective.

AFFIRMED.