

FILED

IN THE COURT OF APPEALS OF IOWA AUG - 9 1979

CLERK SUPREME COURT

347

STATE OF IOWA,)

Plaintiff-Appellee,)

Filed August 9, 1979

vs.)

DOUGLAS ALLEN DOWNS,)

Defendant-Appellant.)

193
62559 & 60

Appeal from Tama District Court - Hon. John L. Hyland, Judge.

Defendant appeals from sentence pursuant to plea of guilty to two counts of possession, with intent to deliver, of a schedule II controlled substance, contending the trial court erred in not finding him to be a chronic abuser of a controlled substance and sentencing him pursuant to section 204.409(2), The Code 1977. AFFIRMED.

Barry S. Kaplan of Fairall, Fairall, Reeves & Kaplan, Marshalltown, Iowa, for defendant-appellant.

Thomas Miller, Attorney General of Iowa; Lona Hansen, Assistant Attorney General; and Jared Bauch, Tama County Attorney; for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant appeals from concurrent sentences of not more than five years imposed after pleas of guilty to two counts of possession of a schedule II controlled substance with intent to deliver, in violation of section 204.401(1), The Code 1977. He contends the trial court should have found him to be a chronic abuser of controlled substances and, pursuant to section 204.409(2), The Code, sentenced him to commitment to a drug abuse treatment program.

Section 204.409(2) provides in relevant part:

2. Whenever the court finds that a person who is charged with a violation of §204.401 and who consents thereto, or had entered a plea of guilty to or been found guilty of the violation of said Section, and who was addicted to, dependent upon, or a chronic abuser of any controlled substance and that person will be aided by proper medical treatment and rehabilitative services, it may order that he be committed as an in-patient or out-patient to a facility approved by the State Department of Health, for such medical treatment and rehabilitative services . . .

This procedure is available both before and after conviction. If it is ordered by the court, the person or institution providing the treatment shall advise the court when the defendant has achieved maximum benefit from the treatment. The criminal prosecution is then completed. A defendant so treated is ultimately sentenced as provided by law, except that the court may, in such instances, remit any portion of the sentence.

It is clear that both the ordering of the rehabilitative treatment and the remitting of any portion of the sentence are discretionary with the trial court. See State v. Prothero, 242 N.W.2d 304, 306 (Iowa 1976); State v. Horton, 231 Iowa 36, 39 (Iowa 1975). In the present case, the defendant's showing of dependency or chronic abuse is not strong. It rests entirely on a letter from a clinical psychologist stating that based upon defendant's past record of substance abuse "he would be an appropriate candidate for admission to a substance abuse treatment program." In the presentence investigation report prepared in the present case, the preparer states that defendant told him that defendant had discontinued using all drugs except approximately 12 cans of beer per week. In a supplement to the presentence investigation report, an alcohol and drug abuse counsellor in the ADASI program, who had interviewed defendant on eight separate occasions, concluded that he had no drug dependency at the time of sentencing. Defendant himself, when addressing the court at the time of sentencing, spoke only of past drug abuse.

Evidence was offered at the sentencing hearing by the preparer of the presentence investigation report that defendant's need for assistance with a drug problem, if any, could be satisfied by substance abuse counselling within a penal institution. He recommended that defendant be sentenced in the manner which was done by the trial court. We conclude that the trial court did not abuse its discretion by failing to employ the sentencing alternatives contained in section 204.409(2). It stated its reasons for not doing so on the record. We find that such reasons are sufficient and have support in the record. We find no ground to interfere with the sentences imposed.

AFFIRMED.