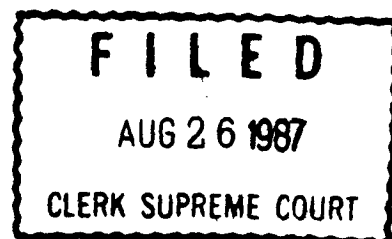


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

Plaintiff-Appellee,

vs.

DONALD LANE,

Defendant-Appellant.

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Filed August 26, 1987

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7-211
86-1033

Appeal from the Iowa District Court for Jasper County (No. T-17),
Thomas W. Mott, District Associate Judge.

The defendant appeals the sentence imposed upon his conviction of operating a motor vehicle while intoxicated, first offense, claiming the court abused its discretion in sentencing. **REVERSED AND REMANDED FOR RESENTENCING.**

Charles L. Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Daniel W. Perkins, Assistant Attorney General; and James R. Wilson, Assistant County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Schlegel and Sackett, JJ., decided en banc.

SCHLEGEL, J.

The defendant appeals the sentence imposed upon his conviction of operating a motor vehicle while intoxicated, first offense, claiming the court abused its discretion in its sentencing of him. We reverse and remand for resentencing.

The defendant was charged with the offense of operating a motor vehicle while intoxicated, first offense. Following a one day trial, he was found guilty as charged. The court sentenced defendant to a fine in the amount of \$600 plus surcharge, and ninety days in the county jail, with all but ten days of that jail time being suspended, and placed him upon two years probation.

Our scope of review is for correction of errors at law. Iowa R. App. P. 4. We will not find a sentencing court abused its discretion unless such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. State v. Wright, 340 N.W.2d 590, 593 (Iowa 1983).

Defendant first argues that the district court abused its discretion in following a predetermined policy of refusing to grant deferred judgments in OWI cases.

The record shows that prior to the date set for trial, counsel for the defendant filed a motion for change of judge, and also, a motion for change of venue. From those motions, it is clear that counsel for the defendant was seeking to bring the case before a judge who would favorably consider a deferred judgment or sentence of his client. His motions alleged that the judge before whom the case was assigned would not consider such disposition in his client's case because of an alleged consistent and routine denial of deferred sentences in convictions for operating a motor vehicle under the influence. Hearing was held upon those motions and the court denied both of them.

At the hearing on those motions, counsel offered evidence, in the form of a statistical report. That report showed that in 1985 in Jasper County, Iowa,

out of 120 convictions for OWI, either by trial or guilty plea, no deferred sentences had been pronounced, and that all convictions resulted in jail sentences. It showed that eighty convictions resulted in fines. On the basis of this exhibit, defendant asked the judge to recuse himself, claiming it showed he had a policy against granting deferred sentences.

The court correctly stated that it is not appropriate for a judge to have a policy regarding sentencing, and cited State v. McKeever, 276 N.W.2d 385, 387 (Iowa 1979), as authority for that rule. Further, the court stated:

Where there is the allegation, though, that the court will not consider granting deferred sentences in this matter, then the affiant is misinformed. (Emphasis added.)

The court also made the following statement prior to the sentence:

The defendant's behavior up to now hasn't given much hope for a belief that he's recognized that he's done anything wrong. The defendant's testimony, I believe, was—I hate to say preposterous, but it tried to persuade the jury of an anomaly that intoxication, if it's caused by NyQuil, is not somehow illegal, it's not dangerous to other persons, that it's not a violation of the law, that somehow being intoxicated on something that's not Budweiser isn't illegal.

I also will recall for you that the defendant's testimony of only having eight beers and the time during which he consumed the cough syrup is inconsistent with the evidence of his blood alcohol content. In considering that and the objects of sentencing, that is, to see to the defendant's rehabilitation as much as possible and to maximize protection for the public from further offenses by the defendant and others, it appears that the defendant's done little toward rehabilitation.

We are faced with the determination whether, in fact, the court exercised its discretion in sentencing defendant, or, as claimed by defendant, the court had a policy of refusing to grant deferred disposition in OWI first offense cases, and sentenced defendant in response to that policy.

While the court's statement indicated that an allegation that the court would not consider deferred sentences in this matter was the result of a misinformed affiant, there is no doubt that all the evidence in the record shows

that no deferred dispositions were granted in OWI first offense cases in 1985. (The report placed in the record appears to be undisputed.)

The question before us is not whether the court abused its discretion in deciding upon the sentence in this case, but whether it failed to exercise its discretion because of its adherence to a policy of granting no deferred dispositions in such cases. In State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979), our supreme court quoted In re Frazzita, 147 N.Y.S.2d 11, 16-17 (N.Y. Sup. Ct. 1955), as follows:

There are many instances in which the Supreme Court and other courts are required to exercise discretion. Any such determination has long been recognized as requiring an actual exercise of judgment upon the part of the court. To do so necessitates a consideration by the court of the facts and circumstances which are necessary to make a sound, fair and just determination. The court is not permitted to arbitrarily establish a fixed policy to govern every case, as that is the exact antithesis of discretion.

We believe that it strains credulity, in view of the record of cases shown by the report, to conclude that the court has no such policy. It seems inconceivable that if such disposition was considered in Jasper County, it would not have been utilized in one or more cases out of the 120 convictions shown by the record. Accordingly, we believe that whether consciously or not, the court has a policy that refuses to grant deferred disposition in cases such as this one. Such refusal constitutes a failure to exercise its discretion in determining the sentences to be pronounced in cases such as this case.

Contrary to the trial court's indication that deferred disposition would be considered in this case, the record does not demonstrate that such disposition was considered. The record of the sentencing proceeding shows that the court considered most important, the fact that it perceived the defendant did not recognize he had done anything wrong, and that he had done little toward rehabilitation. As is stated in Hildebrand, 280 N.W.2d at 396:

Both before and after enactment of the Iowa Corrections Code, however, we have indicated trial court must actually apply discretion:

The trial court and we on review 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. [Citing cases.]

We believe that the court's sentencing of the defendant in this case falls short of this rule. In view of the record in this case, and of the likelihood of a policy against the granting of deferred treatment in such cases, we believe that the sentencing demonstrates a lack of the exercise of discretion on the part of the court.

Unquestionably, as has been stated upon many occasions, the sentencing judges are aware and concerned with the carnage on the highways resulting from drinking and driving. See State v. Jackson, 204 N.W.2d 915, 917 (Iowa 1973). This judge may feel that the crime here involved is far more serious than it is considered by other judges. The court in this case obviously feels strongly about this crime. It may be that this court feels the most important motivation for rehabilitation of one convicted of drunk driving is a requirement of jail time and a continuing record of the conviction, in addition to such fine and other conditions as are imposed. If that is the court's conviction, and if the particular case meets the criteria that require such disposition, after considering all relevant factors, it is, alone, that judge's prerogative to fashion a sentence that meets those convictions. That does not mean that the court can properly exclude any alternative disposition of a case on the basis of a fixed policy. The sentence cannot be said to fit the person, as well as the crime, unless, in the exercise of discretion, consideration is given to all relevant factors in the sentencing in each case.

We believe that this matter should be remanded to the trial court for resentencing, with meaningful consideration being given to deferring sentence or judgment. We also hold that, as in State v. Kelley, 357 N.W.2d 638, 640 (Iowa App. 1984), and Wright, 340 N.W.2d at 593, where the trial courts spelled out the reasons for denying a deferred judgment, the court, upon resentencing, should state proper reasons for the sentence, and if it denies deferred disposition, the reasons why. We do not, by this action, attempt to direct what the disposition should be. In view of the pretrial record made in this case, we believe that resentencing, with such consideration being given, is the appropriate way to resolve this matter.

Defendant also complains that the sentence was in part the result of the defendant standing trial. The trial court was not impressed with the defense offered. Neither was the jury. The court may consider the defendant's character, as well as the other factors in the sentencing statute. Many things are appropriate to consider in determining what that character is. Defendant's attitude at trial, or in the presence of the sentencing judge, will obviously enter into the judge's appraisal of the defendant's character. The court may not consider the fact that the defendant chose to stand trial rather than to plead guilty. State v. Nichols, 247 N.W.2d 249, 255 (Iowa 1976). It is not proper to enhance the sentence because the defendant would not confess his guilt. Id.; State v. Drake, 224 N.W.2d 476, 479-80 (Iowa 1974). In this case, similar to the trial court in Drake, the court felt that defendant's failure to demonstrate his feeling that he had done anything wrong, and his offering of evidence of other possible sources of his condition, showed that he had done very little toward rehabilitation. This, in fact, was the major reason given for the sentence pronounced by the court. As in Drake, such consideration, standing alone, does not justify an enhanced sentence. Such consideration constitutes consideration

of improper factors in the sentencing of the defendant. A consideration of only relevant factors will assure the exclusion of improper facts in the sentencing process.

REVERSED AND REMANDED FOR RESENTENCING.

All judges concur except Snell and Donielson, JJ., who dissent.

SNELL, J. (dissenting)

I respectfully dissent. The duty of a sentencing judge in every case is to consider available options. State v. McKeever, 276 N.W.2d 385 (Iowa 1979) (quoting State v. Robbins, 257 N.W.2d 63, 70 (Iowa 1977)). If the judge considers the appropriateness of a deferred sentence but chooses to impose another sentence for reasons stated, the legal requirements have been met.

In this case the trial judge said the affiant was misinformed in alleging that the court would not consider granting a deferred sentence. In rejecting the deferred sentence option in favor of another sentence, the judge gave as reasons: (1) defendant's behavior shows a failure to recognize he's done anything wrong; (2) defendant's belief that intoxication caused partly by Nyquil consumption is not illegal; (3) defendant's little effort toward rehabilitation; (4) protection of the public.

I am not willing to conclude, as does the majority, that this case is like State v. Drake, 224 N.W.2d 476, 479-80 (Iowa 1974), which was remanded for resentencing because the original sentence imposed was based entirely upon the defendant's refusal to plead guilty. The court in the case at bar made no such criticism of defendant. Nor do I believe, as does the majority, that a policy against considering a deferred judgment is established by a statistical count of 120 convictions with no deferred judgments granted, particularly when the judge denies the allegation.

I would affirm.

Donielson, J., joins this dissent.