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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
THEODORE PAUL WINKOWSKI,)
Defendant-Appellant.)

Filed September 6, 1984 372

4-253
83-1260

Appeal from the Iowa District Court for Benton County - Robert E. Ford, Judge.

Defendant appeals from a resentencing order imposed upon his conviction of sexual exploitation of children. AFFIRMED.

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

Thomas J. Miller, Attorney General, and Rebecca L. Claypool, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, and Schlegel, JJ.

DONIELSON, J.

The defendant appeals from a resentencing order imposed upon his conviction of sexual exploitation of children. He contends that the resentencing court considered an impermissible sentencing factor, confused probation with parole, and improperly abdicated to the Board of Parole the court's exclusive authority to grant probation. We affirm.

In 1981, Theodore Winkowski entered a plea of guilty to a charge of sexual exploitation of children, a violation of Iowa Code section 728.12. The trial court entered a judgment of conviction and sentenced him to imprisonment "for a period of ten years."

Winkowski's direct appeal from the trial court's decision was dismissed by the Supreme Court of Iowa pursuant to Iowa R. App. P. 104. Winkowski then filed an application for postconviction relief. The postconviction court concluded that the sentencing court had imposed an illegal sentence by providing for a determinate ten-year term rather than an indeterminate term of up to ten years. The postconviction court directed that Winkowski be resentenced. All other issues raised by the defendant were rejected.

At his resentencing proceeding, the court rejected Winkowski's request for probation and imposed an indeterminate prison sentence of up to ten years. Reasons set forth by the court for choosing this sentence included the following comment:

> This Court feels that if the Defendant is to be released he should be released by the Board of Parole and not by a District Court Judge who does not have the necessary information or insight into the Defendant's progress at the institution and whether or not he is ready for release to the public.

Winkowski has appealed the resentencing order. He contends that the language quoted above indicates that the resentencing court considered an impermissible sentencing factor. Specifically, the defendant argues that the court

confused probation with parole and improperly abdicated to the Board of Parole the court's exclusive authority to grant probation.

"The power to grant probation is conferred by statute; it is a power not inherent in the judiciary." State v. Wright, 309 N.W.2d 891, 894 (Iowa 1981). The standards for release on probation are set forth in Iowa Code section 907.5:

> Before deferring judgment, deferring sentence, or suspending sentence, the court first shall determine which option, if available, will provide maximum opportunity for the rehabilitation of the defendant and protection of the community from further offenses by the defendant and others. In making this determination the court shall consider the age of the defendant; the defendant's prior record of convictions and prior record of deferments of judgment if any; the defendant's employment circumstances; the defendant's family circumstances; the nature of the offense committed; and such other factors as are appropriate.

Within the statutory framework, the trial court has the discretion to balance the relevant factors in determining an appropriate sentence. State v. Wright, 340 N.W.2d 590, 593 (Iowa 1983). We interfere with sentencing only if there has been an abuse of discretion or "a defect in the sentencing procedure such as trial court consideration of impermissible factors." Id. at 592. This court will not find an abuse of discretion in a denial of probation unless the defendant shows "that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979).

Winkowski argues that the aforementioned reason for denial of probation was improper. Essentially, the defendant interprets the statement as indicating the court's intention to leave the question of probation to the Board of Parole. The State argues that the statement merely explains the sentencing court's opinion that this was not a proper case for probation. Rather, from the information before the court at the time of resentencing, the determination was made that any "release" would have to be made at a later date in the form of parole.

We recognize that the statutory authority to grant probation lies exclusively with the district court. Iowa Code ch. 907 (1983). A judge cannot abdicate this responsibility to make a sentencing determination. State v. Jackson, 204 N.W.2d 915, 917 (Iowa 1973). However, we cannot say that the sentencing court did, in fact, defer its responsibility to the Board of Parole. The statement in question is somewhat ambiguous. A fair reading of the reason for denial of probation would conceivably support the interpretations offered by both parties. This court recognizes that the trial court proceedings may have shed some light on the meaning of the statement that is not evident from the record. We are hesitant at the appellate level to assume or search for error that, in actuality, may not exist. Moreover, applying the abuse of discretion standard set forth in Buck, the statement simply cannot be characterized as "clearly untenable" or "clearly unreasonable." In light of this standard, we are not willing to presume an impermissible factor was considered absent more express language to that effect. We urge all trial courts to fully explain the underlying reasons for sentences imposed, rather than reducing sentencing procedures to perfunctory words given merely to satisfy technical legal requirements.

Finding no error, we affirm the sentencing determination.

AFFIRMED.

All judges concur, except Schlegel, J., who dissents.