

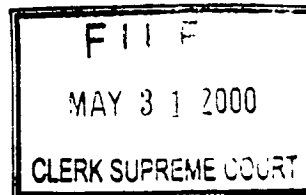
IN THE COURT OF APPEALS OF IOWA

No. 0-175 / 99-1066
Filed May 31, 2000

STATE OF IOWA,
Appellee,

vs.

STEPHEN R. NOREM,
Appellant.



Appeal from the Iowa District Court for Jackson County, J. Hobart Darbyshire, Judge.

Stephen Norem appeals the sentence imposed following his conviction for vehicular homicide. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, and Phillip Tabor, County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

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VOGEL, P.J.

Stephen Norem appeals the sentence imposed following his conviction for vehicular homicide. Because we find the trial court did not rely on unproven charges in determining the appropriate sentence, we affirm.

Background facts. The sentence stems from Norem's guilty plea to homicide by motor vehicle. The incident in reference occurred on December 18, 1997, when, after drinking beer with several friends, Norem drove a vehicle also occupied by his friend, Eric Robbins. An accident occurred, killing Robbins. Although Norem has no recollection of the accident, his blood alcohol level at the time of the incident was .115. In sentencing Norem, the judge reviewed the Presentence Investigation report (PSI) and considered Norem's behavior since the accident. The trial court subsequently sentenced Norem to an indeterminate twenty-five year term of incarceration. Norem appeals this decision, contending the trial court incorrectly considered allegations of other illegal acts, which remained unproven at the time of the sentencing.

Scope of review. A sentence imposed by the trial court will be overturned only for an abuse of discretion. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). Sentencing decisions of the trial court are cloaked with a strong presumption in their favor, and an abuse of discretion will not be found unless the defendant shows that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995). A sentencing court's statement of its reasons is adequate if it recites reasons sufficient to demonstrate the exercise of

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discretion and indicates those concerns which motivated the court to select the particular sentence which it imposed. See *State v. Johnson*, 445 N.W.2d 337, 342-43 (Iowa 1989); see also *State v. Victor*, 310 N.W.2d 201, 205 (Iowa 1981).

Sentencing. Norem alleges the trial court incorrectly considered three unproven charges when sentencing him. The PSI contained information regarding the charges: possession of alcohol, which had been dismissed; trespass, also dismissed; and aggravated battery, which was pending in Illinois. The court must state on the record the reasons for the sentence imposed. Iowa R. Cr. P. 22(3)(d). The court is prohibited from relying on additional, unproven and unprosecuted charges unless there is proof the facts are valid or an admission from the defendant. See *State v. Black*, 324 N.W.2d 313, 315 (Iowa 1982). The charges pending against Norem had not yet been tried to a court of law or admitted by him. To determine whether the court considered unproven or dismissed charges, we must review the statement of the court at sentencing. The court gave the following analysis:

Well, I've carefully and thoroughly reviewed the Presentence Investigation in this matter; and I appreciate the benefit of counsel's input into the matter of sentencing and the options that are available to the Court, and also Mr. Norem's own statements that he's made.

Mr. Norem's life has not been a - - an ideal one up to this point in time. Certainly there was a - - the Presentence Investigation indicates that there was little sense of direction and control, and he's literally as a teenager been pretty much left to his own devices.

What Mr. Norem has going for him, in effect, is only that, his age at the time that the offense occurred. He was not immediately charged as an adult after this tragedy occurred in December of 1997, and I suspect that the - - the reason for not doing that at the time was a hope that it would so shocken [sic] and shatter him that

he would be receptive to some positive guidance and receptive to changing his life.

The formal juvenile probation was started in March of 19- - - or I'm sorry, the - - the action indicated by the Presentence Investigation, however, did not pay much benefit. This offense occurred in December, on December 18 of '97; and by February 22 of 1998, some sixty days later, he's charged as a juvenile in possession of alcohol. Formal juvenile petition filed November 20 - - or March 23rd accusing him in this case as a juvenile of Homicide by Motor Vehicle. He was placed on supervised pretrial release, supervision; and if not at home, he was to be in the company of his mother. That was at the time he - - in April that he was placed on pretrial release.

Sixty - - Less than sixty days later, he's stopped in a traffic stop, obviously by himself, sent to Montrose Juvenile Detention overnight, released again the following morning; and of course, as a result of that - - Also, the juvenile officer gets a complaint of trespass by him on school property at Miles on May 28, 1998. I mean, *he's clearly totally ignored the terms of the formal juvenile probation, with about as reckless abandon as can be imagined.*

And then, of course, you know, the real big one, December 30, 1998, he's charged with a felony, aggravated battery, which is a Class Three Felony in Illinois, as a result of a fight in Savanna, Illinois, on December 23, 1998. The Presentence Investigation indicates that charge is *still outstanding*.

I am aware from the Presentence Investigation that the circumstances of Mr. Norem's life have not been the most ideal. On the other hand, he has *shown little proclivity to changing his conduct*. Although he shows appropriate sympathy and sorrow at the death of his friend, *he still insists that he's going to do life his way and not the way we believe it should be conducted.*

It is not within my ability, having considered the entire Presentence Investigation, in believing that the balance of determining how best to rehabilitate Mr. Norem, while at the same time protecting the interests of society from further crimes by him, and also serving as a deterrent for others, to grant the request for a deferred judgment. He is not appropriate for consideration at the Residential Corrections Facility in the judgment of Mr. Hendrickson. Mr. Hendrickson's been doing this kind of work, thoughtfully, considerately, for thirty years or better. The Presentence Investigation does not recommend it. And the Court does not

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believe that it's appropriate in terms of the seriousness of the offense and the need to deter both the defendant and others from his conduct.

Accordingly, the application for deferred judgment is denied; and judgment of conviction is entered on Defendant's plea of guilty to the charge of Homicide by Motor Vehicle in violation of Iowa Code Section 707.6A and 707.6A(1)(a).

It is the sentence of the Court that the defendant be committed to the custody of the Director of the Iowa Department of Corrections for a period of not to exceed twenty-five years. The designated reception center to which the defendant will be taken by the Jackson County Sheriff is the Iowa Medical and Classification Facility at Oakdale. (emphasis added)

"In applying discretion, the court 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." *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999). The trial court, in providing its extensive ruling, considered many factors before issuing its sentencing order. We can establish, from the above narrative, that the trial court carefully balanced Norem's personal history against his character including his ability to accept guidance and restriction, his propensity to refuse to adhere to any rules or authority and the negative consequences of his actions on himself and society. The State contends the trial court examined the charges objected to by Norem, not as an assignment and punishment for guilt in those charges, but rather as an indication of Norem's unwillingness to accept responsibility for his mistakes and adhere to the terms of his pretrial release,

which restricted his freedom to his home, unless accompanied by his mother. The trial court, rather than questioning or determining whether Norem committed the offenses he was charged with, focused instead on the fact that the incidents violated his pre-trial release. The court did not presume the guilt of such allegations in its sentencing procedure.

In addition, Norem's attorney offered some corrections to the PSI, including correcting the name of the officer who stopped a vehicle in which Norem was a passenger but did not deny the incident occurred. He also corrected a reference in the PSI from "at least" one alcohol violation following the accident to just "one" violation. A sentencing court is free to consider unchallenged information in a PSI. *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998).

In attempting to determine if Norem should be incarcerated or given probation, the trial court examined his behavior following the accident in response to the terms of the pre-trial release and found, "[h]e's clearly totally ignored the terms of the formal juvenile probation, with about as reckless abandon as can be imagined." The trial court, therefore, appropriately considered Norem's unrefuted failure to comply with the conditions of his pretrial release. Because we find the trial court did not allow the presumed guilt of the offenses charged to factor into the sentencing outcome, but rather considered Norem's behavior in the previous probationary situation to determine if further probation would be successful, we affirm.

AFFIRMED.

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