FILED
MAY 30 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed May 30, 1980
vs.)
RAYMOND LINDSEY LEININGER,) 0-101 / 61637
Defendant-Appellant.)

Appeal from Humboldt District Court - Newt Draheim, Judge.

Defendant appeals imposition of prison sentence of not more than ten years imposed under section 902.9, supplement to the Code 1977, after he pleaded guilty to the crime of sexual abuse in the third degree (statutory rape) in violation of section 709.4, supplement to the Code 1977. AFFIRMED.

Eldon J. Winkel and James McGlynn of Winkel, Nitchals & Winkel, Algona, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Shirley Steffe, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant, Raymond Lindsey Leininger, appeals imposition of prison sentence of not more than ten years imposed under section 902.9, supplement to the Code 1977, after he pleaded guilty to the crime of sexual abuse in the third degree (statutory rape) in violation of section 709.4(3), supplement to the Code 1977. On appeal, defendant asserts trial court abused its discretion in refusing to suspend his sentence and imposing the maximum sentence.

Our review is limited to correction of errors at law. Iowa R. App. P. 4.

I.

Defendant was charged by information with the crime of rape in violation of section 698.1, The Code 1977, to which he pleaded guilty on October 10, 1977. At the sentencing hearing on January 9, 1978, the court allowed defendant to change his guilty plea and be sentenced under the revised criminal code in accordance with section 801.5, supplement to the Code 1977. Defendant then pleaded guilty to the crime of sexual abuse in the third degree in violation of section 709.4, supplement to the Code 1977. Defendant and his counsel requested probation, but the court imposed the maximum sentence of imprisonment for not more than ten years.

II.

Defendant initially contends the trial court abused its sentencing discretion by not granting him probation. We find this argument to be without merit since Iowa law prohibits the court from suspending the sentence of persons convicted of forcible felonies. § 907.3, supplement to the Code 1977. Defendant was convicted of sexual abuse in the third degree, § 709.4(3), supplement to the Code 1977, which is classified as a forcible felony, § 702.11, supplement to the Code 1977. Thus, the trial court did not possess the discretion to suspend defendant's sentence and place him on probation. § 907.3, supplement to the Code 1977.

Defendant also contends the trial court erred by imposing the maximum prison sentence for the crime of sexual abuse in the third degree. This assertion, however, is contrary to Iowa's indeterminate sentence law that permits the sentencing judge to impose only the statutory maximum sentence set for the specific crime once he or she determines a term of confinement is required. § 902.3, The Code 1979. The parole

board makes the ultimate determination of the length of sentence within the statutory maximum. § 906.3, The Code 1979; see State v. Kulish, 260 Iowa 138, 145, 148 N.W.2d 428, 433 (1967). The sentence was within statutory limits and is not excessive unless it resulted from an abuse of discretion. State v. Inger, No. 63413, slip op. at 13-14 (Iowa, filed May 21, 1980); State v. Nelson, 279 N.W.2d 1, 3 (Iowa 1979); State v. Grimme, 274 N.W.2d 331, 338 (Iowa 1979); State v. Noonan, 246 N.W.2d 236, 237 (Iowa 1976). Generally, abuse of discretion will be found only where the decision is not supported by the evidence. Noonan, 246 N.W.2d at 237 (quoting State v. Warner, 229 N.W.2d 776, 783 (Iowa 1975)). A sentence represents abuse of discretion if it is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not exercise of reason but rather of passion or bias." Warner, 229 N.W.2d at 783 (quoting Wendel v. Swanberg, 384 Mich. 468, 475-76, 185 N.W.2d 348, 351 (1971)), quoted in Noonan, 246 N.W.2d at 237.

The trial court's judgment and sentence cannot be characterized as perversity of will, defiance of judgment, or the exercise of passion or bias. In imposing the sentence, the trial court stated its concern for such relevant considerations as the welfare of the thirteen-year old victim and the protection of society from such crimes. See State v. Overstreet, 243 N.W.2d 880, 887 (Iowa 1976). Considering the facts of this case, we hold the trial court did not abuse its discretion.

Trial court is affirmed.

AFFIRMED.