IN THE COURT OF APPEALS OF IOWA

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No. 1-515 / 00-0620
Filed November 16, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID DUANE DAINS,
Defendant-Appellant.

Appeal from the Iowa District Court for Benton County, William R. Eads, Judge.

Defendant appeals from his conviction for second-degree criminal mischief. **CONVICTION AFFIRMED; SENTENCE VACATED; AND CASE REMANDED FOR RESENTENCING.**

Jerald W. Kinnamon and Jon M. Kinnamon, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, David C. Thompson, County Attorney, and Anthony H. Janney, Assistant County Attorney, for appellee.

Heard by Mahan, P.J., Hecht, J., and Habhab, S.J.*

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* Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2001).

MAHAN, P.J.

On appeal from his conviction for second-degree criminal mischief, the defendant David Duane Dains argues the district court (1) improperly considered an unproven charge and facts outside of the record when sentencing him; (2) violated the parties' dispositional agreement; (3) erred in considering a victim impact statement which was based on an unproven charge; and (4) entered an illegal and void restitution order. Dains also argues his trial counsel was ineffective in: (1) failing to provide the district court with a detailed recital of the terms of the parties' dispositional agreement; (2) failing to ensure the district court confined its consideration of the minutes to only those facts relevant to the criminal mischief charge; and (3) failing to object to the use of Kibe's victim impact statement at sentencing. We affirm the conviction; vacate the sentence; and remand the case for resentencing.

Background Facts and Proceedings. On July 19, 1999, Dains was participating in a stock car race at the Benton County Speedway in Vinton. During the race, Dains became increasingly angry regarding the driving of fellow racer, Benjamin Metcalf. After the race, Dains proceeded to Metcalf's pit and told Metcalf he was tired of him hitting his racecar intentionally and it needed to stop. An argument ensued between Dains, Metcalf, and Metcalf's pit crew. During the argument, Dains threatened to intentionally hit Metcalf's racecar. Dains then walked to his racecar and proceeded to drive it into the right side of Metcalf's racecar. Dains's car then stopped and backed away from the racecar. At this time, members of Metcalf's pit crew attempted to get Dains out of his car. Dains

then proceeded to drive his car away from Metcalf's pit. Shawn Kibe, a member of Metcalf's pit crew, was injured during the incident. Kibe suffered several injuries to his hand, back, and head. He was taken to the hospital for treatment.

Dains was charged with second-degree criminal mischief, a class "D" felony, in violation of Iowa Code sections 716.1 and 716.4 (1999) (Count I); and failure to leave information and aid at the scene of a personal injury accident, a serious misdemeanor, in violation of Iowa Code sections 321.261(1) and (2) (Count II). On January 13, 2000, Dains waived his right to a jury trial. Dains agreed to a bench trial on the second-degree criminal mischief charge based on the minutes of testimony in exchange for dismissal of the latter charge.[1] On January 26, 2000, the court found Dains guilty of second-degree criminal mischief. On April 7, 2000, Dains was sentenced to an indeterminate five-year term of imprisonment, a $750 fine, and was ordered to pay restitution to Kibe in the amount of $4,708.49. Dains appeals.

I. Sentencing. The State contends Dains failed to preserve error on his challenge to the district court's sentence. We find Dains's error preservation record is minimally sufficient and elect to proceed to the merits.

In reviewing Franklin's challenges of the district court sentence, we review for abuse of discretion. *State v. Duckworth*, 597 N.W.2d 799, 800 (Iowa 1999). "A sentence will not be upset on appellate review unless a defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as the trial court's consideration of impermissible factors." *State*

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[1] On January 8, 2000, the court dismissed the charge of failure to leave information and aid at the scene of an accident involving a personal injury.

v. Witham, 583 N.W.2d 677, 678 (Iowa 1998). Such abuse will only be found if the district court's discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Duckworth*, 597 N.W.2d at 800.

A. Consideration of Unproven Offenses.

Dains first maintains the district court improperly considered an unproven charge and facts outside of the record when sentencing him. Dains contends injuries to Kibe were the result of the unproven offense of failure to leave information and aid at the scene of a personal injury accident and any reliance by the district court on Kibe's injuries in sentencing him on the charge of criminal mischief was error. We disagree.

A sentencing court may not consider an unproven or unprosecuted offense when sentencing a defendant unless (1) the facts before the court show the accused committed the offense, or (2) the defendant admits it. *State v. Gonzalez*, 582 N.W.2d 515, 516 (Iowa 1998). In order to overcome the presumption the district court properly exercised its discretion, there must be an affirmative showing the court relied on improper evidence. *State v. Dake*, 545 N.W.2d 895, 897 (Iowa Ct. App. 1996). Our supreme court has recently held "when a challenge is made to a criminal sentence on the basis that the court improperly considered unproven criminal activity, the issue presented is simply one of the sufficiency of the record to establish the matters relied on." *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000).

We conclude Dains failed to make the necessary affirmative showing the sentencing court impermissibly relied on uncharged and unproven offenses or

facts. After a careful review of the sentencing proceedings, we find the district court did not rely on the charge of failure to leave information and aid at the scene of a personal injury accident when sentencing Dains. We acknowledge the district court at sentencing did rely on injuries suffered by Kibe. However, in determining an appropriate sentence a court may look to the facts and circumstances surrounding the crime. *State v. Manser*, 626 N.W.2d 872, 874 (Iowa Ct. App. 2001). In the present case, the stipulated minutes of testimony indicate the injuries Kibe suffered were part of the same course of conduct from which the criminal mischief charge arose. As a result, the facts before the court demonstrated Kibe's injuries were the direct result of Dains's criminal mischief. Therefore, the district court did not act improperly in considering Kibe's injuries. Accordingly, we conclude the district court did not abuse its discretion, and affirm on this issue.

B. Dispositional Agreement.

Dains next contends the district court violated the parties' dispositional agreement to eliminate any references to the injuries to Kibe in the stipulated trial on the minutes of testimony. There is no merit to Dains's argument on this issue. After a careful review of the record, we find there was no dispositional agreement between the State and Dains that the district court would not consider the injuries to Kibe in sentencing Dains. Furthermore, we concluded above the district court did not act improperly in considering Kibe's injuries. Therefore, we affirm the district court on this issue.

C. Kibe's Victim Impact Statement.

Dains next argues the district court erred in considering the prejudicial allegations of Kibe's victim impact statement.[2] A victim may present a written or oral victim impact statement to the district court at the time of sentencing. Iowa Code § 915.21. Therefore, the district court certainly had the authority to consider Kibe's victim impact statement at the time of sentencing. *Id.* In addition, we have already decided above that the district court acted properly in considering Kibe's injuries.

The real issue before this court is whether the district court abused its discretion in placing too much emphasis on the victim impact statement in this case, thereby ignoring other relevant considerations.

The record is clear the assistant county attorney felt this was an appropriate case for the granting of a deferred judgment. He made this clear to the district court several times at the sentencing hearing while indicating he was fully aware the presentence investigation recommended a suspended sentence. He also informed the court neither Metcalf nor Kibe wanted Dains to be imprisoned. Dains's attorney also stated he felt a deferred judgment was an appropriate disposition in this case. The district court then read a portion of Kibe's victim impact statement into the record and, without any additional statements concerning this matter, sentenced Dains to an indeterminate term not to exceed five years. The district court then made a statement concerning the reasons supporting the sentence:

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[2] The State does not address this issue in its brief.

> Reasons and facts that support this disposition are, one, this sentence can act as a deterrent against commission of similar offenses; two, the nature of the offense that could potentially endanger other people; three, the severe nature of the injuries of Shawn Kibe that resulted from the commission of the offense with which he was charged and sentenced.

The nature of the offense and deterrent effect of the sentence are, standing alone, too general to form the basis of a discretionary sentence. *State v. Dvorsky*, 322 N.W.2d 62, 67 (Iowa 1982). The only other reason given by the district court was the severe nature of the personal injuries to Shawn Kibe even though the offense charge involved property damage to Benjamin Metcalf. The district court did not take into account other minimal essential factors that must be considered in the sentencing process. *State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979).

We are, of course, fully cognizant of the fact Dains has not appealed his sentence based upon the district court's failure to state adequate reasons therefor. However, reviewing these reasons in light of the district court's reliance on the victim impact statement leads us to conclude said statement had a prejudicial effect in this case. *State v. Sumpter*, 438 N.W.2d 6, 9 (Iowa 1989). In *Sumpter*, it was argued the victim impact statement "could very possibly" have affected the court's exercise of discretion. *Id.* In the instant case, the victim impact statement clearly affected the district court's exercise of discretion and was prejudicial to Dains. Accordingly, we vacate the sentence and the case is remanded for resentencing.

D. Kibe's Restitution.

Restitution is a mandatory part of sentencing in Iowa. *State v. Mai*, 572 N.W.2d 168, 171 (Iowa Ct. App. 1997). In all criminal cases where there is a verdict of guilty "the sentencing court shall order that restitution be made by each offender to the victims of the offender's criminal activities." Iowa Code § 915.100(2)(a). Restitution is defined, in pertinent part, as "payment of pecuniary damages to a victim in an amount and in the manner provided by the offender's plan of restitution." Iowa Code § 910.1(4). A victim is defined as "any person who has suffered pecuniary damages[3] as a result of the offender's criminal activities." Iowa Code § 910.1(5).

Restitution orders are not limited by the parameters of the offense committed, but may be extended to any damages sustained by the victim of a crime which, with some exceptions, would be recoverable against the offender in a civil action. *Mai,* 572 N.W.2d at 171. "Consequently, in each instance, the State must prove by a preponderance of the evidence a causal connection exists between the criminal act and the victim's damages." *Id.* A trial court abuses its discretion and exceeds its statutory authority when it orders restitution for losses not causally related to the offenses. *Id.*

Dains's challenge to the district court's restitution order is premised on his contention the State has failed in its burden to establish a causal connection between his criminal conduct and the injuries suffered by Kibe. In the absence of

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[3] Pecuniary damages are defined as "all damages to the extent not paid by an insurer, which a victim could recover against the offender in a civil action arising out of the same facts or .event, except punitive damages and damages for pain, suffering, mental anguish, and loss of consortium." Iowa Code § 910.1(3).

such connection, Dains argues the district court entered an illegal and void restitution order. We disagree.

We have concluded the facts before the court demonstrated Kibe's injuries were the direct result of Dains's criminal mischief. Therefore, we find the State has shown a causal connection between Dains's criminal act and Kibe's injuries. Furthermore, the record shows during sentencing Dains agreed to pay restitution to Kibe. Dains's attorney stated "I want to tell the Court that at this point my client has no objection to that portion of the restitution request that has been submitted by Mr. Kibe." In fact, it was Dains's position at sentencing that he should not be incarcerated because he would then be unable to pay restitution to Kibe. The State contends, and we agree, Dains may not now claim the restitution order he fully agreed to is illegal and void.

Moreover, there is sufficient evidence in the record to support the restitution amount set by the court in this case. The record directly supports the amount of restitution; the amount set was not speculative. The State adequately showed the amount of damages Kibe suffered by Dains's criminal mischief. As a result, we reject Dains's claim the restitution order was illegal and void, and affirm the district court's restitution award.

II. Ineffective Assistance of Counsel Claims. Dains also claims he was denied effective assistance of counsel. We review such claims de novo. *State v. Ledezma*, 626 N.W.2d 134, 141 (Iowa 2001).

Ordinarily we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the

facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil,* 264 N.W.2d 293, 296 (Iowa 1978). We will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998). We conclude the record is adequate to decide Dains's claims on this direct appeal.

Dains claims his trial counsel was ineffective in (1) failing to provide the district court with a detailed recital of the terms of the parties' dispositional agreement; (2) failing to ensure the district court confined its consideration of the minutes to only those facts relevant to the criminal mischief charge; and (3) failing to object to the use of Kibe's impact statement at sentencing.

Based upon our discussion above, Dains's first two claims of ineffective assistance of counsel must fail. Additionally, there is no need to consider the third claim based on our decision to remand this case for resentencing.

CONVICTION AFFIRMED; SENTENCE VACATED; AND CASE REMANDED FOR RESENTENCING