IN THE COURT OF APPEALS OF IOWA

No. 0-483 / 99-1490
Filed August 30, 2000

FILED
AUG 30 2000
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JERRY ALLEN TOLBERT,
Defendant-Appellant.

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

The defendant appeals the sentence imposed following his conviction of delivery of cocaine in violation of Iowa Code section 124.401(1) (1997) and possession of cocaine in violation of section 124.401(5). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, William E. Davis, County Attorney, and Robert E. Weinberg, Assistant County Attorney, for appellee.

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

HECHT, J.

Jerry Tolbert appeals the sentence imposed following his conviction of delivery of cocaine in violation of Iowa Code section 124.401(1) and possession of cocaine in violation of section 124.401(5) (1997). Tolbert contends the district court abused its discretion by sentencing him to a term not to exceed twenty years in prison pursuant to Iowa Code section 124.411 without considering whether to sentence him to a lesser sentence. He also argues the district court failed to comply with Iowa Rule of Criminal Procedure 22(3)(d). We affirm.

I. Factual Background and Proceedings. Officer James Stark testified he was working as an undercover officer in Davenport, Iowa on March 12, 1999. Delano Williams haled Stark who stopped his vehicle, and the two conversed. Stark told Williams he wanted to buy a $50 rock of cocaine. After receiving $50 from Stark, Williams spoke with Tolbert. Tolbert then handed a piece of rock cocaine to Williams who broke it and gave part of it to Stark.

On May 24, 1999, the State charged Tolbert with delivery of cocaine base and possession with intent to deliver cocaine base, both in violation of Iowa Code section 124.401(1)(c). On August 23, 1999, the day of trial, the State amended the trial information to include the allegation Tolbert had committed a prior drug felony in Iowa which qualified him for a sentencing enhancement pursuant to Iowa Code section 124.411(1). On August 24, 1999, the jury returned a verdict finding Tolbert guilty of delivery of cocaine base and guilty of the lesser-included offense of possession of cocaine base in violation of section 124.401(5). Tolbert stipulated he was guilty of a prior drug felony in exchange for the State's

sentencing recommendation of twenty years in prison rather than thirty years for which he was eligible under section 124.411(1).

At sentencing, the State recommended imprisonment for twenty years and defense counsel requested "no more than 20 years." The district court sentenced Tolbert to incarceration for a period not to exceed twenty years on the delivery count, and a period of one year on the possession count, to be served concurrently. On appeal, Tolbert contends the district court had the discretion to sentence him without the enhancement provided in section 124.411(1) and failed to do so. Without the enhancement, the term of incarceration would not exceed ten years. Tolbert argues he is entitled to resentencing because the district court failed to recognize or exercise its discretion to impose a lesser sentence. He also argues the district court failed to comply with the provisions of Iowa Rule of Criminal Procedure 22(3)(d) directing the district court to state the code section pursuant to which a defendant is convicted when pronouncing the sentence.

II. Standard of Review. Our review of the district court's sentence is for an abuse of discretion. *State v. Craig*, 562 N.W.2d 633, 634 (Iowa 1997). 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. *State v. Duckworth*, 597 N.W.2d 799, 800 (Iowa 1999). A sentencing decision is cloaked with a strong presumption in its favor. *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995).

III. Merits.

A. Enhancement Pursuant to Section 124.411(1). Iowa Code section 124.411(1) may be applied to defendants who are habitual drug offenders. The

section provides, in relevant part, "Any person convicted of a second or subsequent offense under this chapter may be punished by imprisonment for a period not to exceed three times the term otherwise authorized." Iowa Code § 124.411(1). In the present case, Tolbert was convicted of violating section 124.401(1)(c), which is a class "C" felony punishable by imprisonment for no more than ten years. *See* Iowa Code §§ 124.401(1)(c) & 902.9(3). Tolbert stipulated he had previously been convicted in 1990 of three counts of delivery of a controlled substance. As a result, his sentence for the present conviction could be enhanced pursuant to section 124.411(1) resulting in a sentence of thirty years.

Tolbert argues, "nothing in the transcripts or other records indicates that the Court realized that the sentence was not required to be enhanced and that [he] could have received the lesser sentence of up to ten years." Tolbert relies on the following language of the district court from the sentencing hearing:

> The criminal lifestyle that you have chosen apparently hasn't impressed on you the fact yet that typically you get caught, and at some point in time, I don't know when, that's going to sink in, but at this point in time we're dealing with an enhanced offense with the sentencing under Count I and with no discretion as far as the Court's concerned to waive any minimums. You've been convicted of the offense before. The sentence is appropriate, based on a review of the presentence investigation, and it is the best method of protecting society from your committing further crimes.

After reviewing the record, we conclude the district court's reference to "discretion" was merely an allusion to Iowa Code sections 901.10(1) and 124.413. Section 901.10(1) provides, "A court sentencing a person for the person's first conviction under section . . . 124.413 . . . may, at its discretion, sentence the person to a term less that provided by the statute if mitigating

circumstances exist." Iowa Code § 901.10(1). Section 124.413 provides, in relevant part:

> A person sentenced pursuant to section 124.401, subsection 1, paragraph *"a", "b", "c", "e", or "f"*, shall not be eligible for parole until the person has served a minimum period of confinement of one-third of the maximum indeterminate sentence prescribed by law.

Iowa Code § 124.413. This was not Tolbert's first conviction and the district court acknowledged it did not have the ability to deviate from the minimum sentence according to statutory provisions. The district court's reference to the lack of "discretion" was not related to the court's consideration of Tolbert's sentence under section 124.411(1). The district court clearly exercised discretion to sentence the defendant to a period of incarceration of less than thirty years in this case.

The defendant has an obligation to provide an appellate court with a record affirmatively disclosing how the district court abused its sentencing discretion. *State v. Vanover*, 559 N.W.2d 618, 635 (Iowa 1997); *State v. Mudra*, 532 N.W.2d 765, 767 (Iowa 1995). Tolbert failed to point to any evidence the district court did not understand the full range of sentencing options. The district court adequately stated its reasons for sentencing Tolbert to a term of incarceration not to exceed twenty years, including his extensive criminal history and other information contained in his presentence investigation report. The district court is not required to give its reasons for rejecting a particular sentencing option. *See Vanover*, 559 N.W.2d at 635; *Loyd*, 530 N.W.2d at 713-14. From the sentencing colloquy, it is clear the district court understood Tolbert could be sentenced pursuant to section 124.411(1) and understood the sentence

could range from ten years to thirty years. Tolbert's sentence of twenty years is within the district court's discretion and is affirmed.

B. Compliance With Rule 22(3)(d). To support his claim the district court failed to exercise its discretion when sentencing him, Tolbert also contends the district court did not comply with rule 22(3)(d) because it did not refer to the code sections pursuant to which he was convicted when the sentence was pronounced. Iowa Rule of Criminal Procedure 22(3)(d) requires the district court to "include in the judgment entry the number of the particular section of the Code under which the defendant is sentenced." Iowa R. Crim. P. 22(3)(d). The Iowa Supreme Court has decided rule 22(3)(d) is directory only. Noncompliance with the rule does not result in prejudice to the defendant, and will not constitute reversible error. *State v. Victor,* 310 N.W.2d 201, 205 (Iowa 1981); *State v. Dawson,* 245 Iowa 747, 749, 63 N.W.2d 917, 918 (1954). Tolbert suffered no identifiable prejudice from the district court's failure to state the code section under which he was convicted. In addition, we do not consider noncompliance with rule 22(3)(d) to be indicative of the district court's failure to exercise or understand the nature of its sentencing discretion. Therefore, this assignment of error is without merit. We affirm the district court's sentence.

AFFIRMED.