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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed September 6, 1984 346

vs.)

TRUMAN NEWHARD,) 4-268
83-1613

Defendant-Appellant.)

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

Defendant appeals the sentence imposed upon his guilty plea conviction of operating a motor vehicle while intoxicated, second offense, in violation of Iowa Code section 321.281. AFFIRMED.

James G. Thomas, Anamosa, Iowa, and John D. Standafer, Marion, Iowa, for defendant-appellant.

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

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

SCHLEGEL, J.

Defendant, Truman Newhard, appeals the sentence imposed upon his guilty plea conviction of operating a motor vehicle while intoxicated, second offense, in violation of Iowa Code section 321.281. Defendant contends that the court abused its discretion in sentencing him to the maximum penalty of imprisonment not to exceed two years. Additionally, defendant claims that the two-year sentence is so grossly disproportionate to the nature and severity of the crime as to constitute cruel and unusual punishment in violation of the eighth amendment to the United States Constitution.

I. Discretion in Sentencing. Imposition of sentences is within trial court's discretionary power and will be set aside only for an abuse of discretion. State v. Carey, 306 N.W.2d 740, 742 (Iowa 1981). When the sentence imposed is within the statutory limits it will be set aside only for an abuse of discretion. State v. Gibb, 303 N.W.2d 673, 687 (Iowa 1981). In determining whether a given sentence constitutes an abuse of discretion, Carey states:

> The trial court and we on review 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.

306 N.W.2d at 742 (quoting State v. Kendall, 167 N.W.2d 909, 911 (Iowa 1969)).

Iowa Code section 901.5 sets out the requirements that the courts must consider, in arriving at an appropriate sentence. It states, in part:

> After receiving and examining all pertinent information, including the presentence investigation report, if any, the court shall consider the following sentencing options. The court shall determine which of them is authorized by law for the offense, and of the authorized sentences, which of them or which combination of them, in the discretion of the court, will provide maximum opportunity for the rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others.

Conviction of operating a motor vehicle while intoxicated, second offense, is an aggrevated misdemeanor. Iowa Code § 321.281(2)(b) (1983). The maximum sentence provided for conviction of an aggrevated misdemeanor is "imprisonment not to exceed two years, or a fine not to exceed five thousand dollars, or both." Iowa Code § 903.1(2) (as amended, 1983 Iowa Acts ch. 183, § 2).

In imposing sentence, the court enunciated reasons which meet the requirements of the statutes providing for such sentences. The court did not consider improper information in arriving at that sentence. The reasons for selecting the two-year sentence were clearly stated by the court. Defendant's claim that "materially untrue information was presented to the court" is not supported by the record.

Defendant's claim that he was not given an opportunity to address the court on mitigation is without merit.

We therefore hold that the court properly exercised its discretion in sentencing the defendant in this case.

II. Cruel and Unusual Punishment. Defendant contends that the sentence imposed in this case is so grossly disproportionate to the nature and severity of the crime that it constitutes cruel and unusual punishment. "Generally, a sentence resulting from a prosecution 'within statutorily prescribed penalties does not constitute cruel and unusual punishment' unless it is grossly disproportionate to the offense." State v. Kyle, 271 N.W.2d 689, 693 (Iowa 1978) (citation omitted).

Initially, it is pointed out that defendant does not attack the constitutionality of the sentencing provisions of section 321.281(2)(b). His attack is upon the constitutionality of the sentence imposed in this case. Under existing authority, we find that the sentence imposed here was not disproportionate to the nature and severity of the crime, and therefore, did not constitute cruel and unusual punishment.

AFFIRMED.