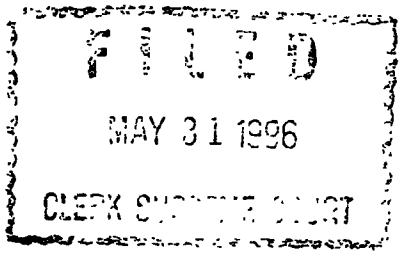
IN THE COURT OF APPEALS OF IOWA

No. 6-136 / 95-214



STATE OF IOWA,

Appellee,

vs.

MARLYS A. BROOKS,

Appellant.

Appeal from the Iowa District Court for Linn County, Lynne E. Brady, Judge.

The defendant appeals her sentence for second-degree theft in violation of Iowa Code section 714.2 (1993). **AFFIRMED.**

Catherine K. Levine, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Angelina M. Smith, Assistant Attorney General, Denver D. Dillard, County Attorney, and Jerry Vander Sanden, Assistant County Attorney, for appellee.

Considered by Cady, P.J., and Huitink and Streit, JJ. Vogel, J., takes no part.

CADY, J.

Marlys Brooks appeals her sentence for second-degree theft. On our review, we affirm.

The State charged Brooks with second-degree theft alleging she wrote three checks to J.C. Penny's totaling over $1000 for which she had insufficient funds. Brooks initially pled not guilty, but later changed her plea to guilty. The district court accepted the guilty plea and entered judgment against Brooks.

At the sentencing hearing in February 1995, Brooks requested probation and, in an effort to counter evidence of her previous criminal history, discussed how her current marriage was more stable than her previous marriages. She stated her criminal activities took place while she was in stormy marriages and, for the first time, she has a strong foundation in her marriage. She also testified she is seeking counseling for her problems.

The district court received a presentence investigation report which detailed Brooks' criminal history, including eleven thefts in the past fifteen years, and recommended a prison term of five years. The investigator also indicated Brooks failed to keep appointments with her and lied about her prior arrests, employment history, and other background information.

The district court sentenced Brooks to an indeterminate term of incarceration not to exceed five years. It stated its reasons for the sentence as follows:

> Defendant is age 37, married for the fourth time, has two children from her first marriage, a 15-year history of theft, including fourteen convictions during that period of time. She's been on probation four times, violated the probation in 1992 during this marriage, has been charged in Georgia during this marriage; she is a liar and a thief. She was ordered to do psychiatric counseling back in 1992. She refused to do so. Probation is of no benefit.

Brooks was also ordered to make restitution to J.C. Penny's and restitution for court costs.

Brooks appeals. She contends the district court relied on impermissible factors, specifically marital history, for sentencing. She further asserts the district court relied upon an inaccurate and unreliable presentence investigation report. The State contends no abuse of sentencing discretion occurred and Brooks failed to preserve error on her contentions concerning the presentence investigation report.

I. Standard of Review

District court sentencing decisions enjoy a strong presumption in their favor. *State v. Peters*, 525 N.W.2d 854, 859 (Iowa 1994). The imposition of a sentence is generally within the discretion of the district court and will be disturbed only upon a showing of an abuse of discretion. *State v. Garrow*, 480 N.W.2d 256, 259 (Iowa 1992); *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa App. 1994). No abuse of discretion will be found unless the discretion is exercised on grounds which are clearly untenable or to an extent clearly unreasonable. *State v. Neary*, 470 N.W.2d 27, 29 (Iowa 1991).

Discretion encompasses a range of reasonable choices upon which individual judges may differ. *State v. Wright*, 340 N.W.2d 590, 593 (Iowa 1983). An abuse of discretion is sentencing is rarely found when the sentence imposed falls within the statutory maximum. *State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983). However, an abuse of discretion occurs when the district court fails to exercise its discretion or considers inappropriate matters in determining what sentence to impose. *Id; Thomas*, 520 N.W.2d at 313.

II. Impermissible Factors

In exercising its sentencing discretion, the district court must weigh all pertinent matters in determining a proper sentence. *State v. Thompson*, 494 N.W.2d 239, 340 (Iowa 1992). Moreover, the district court is required to state its reasons for the particular sentence imposed. Iowa R. Crim. P. 22(3)(d).

Permissible factors for a district court to consider in determining whether deferred sentences or suspended sentences will provide rehabilitation for a defendant include a defendant's age, previous convictions, employment status, family circumstances, the nature of the offense, and other appropriate factors. Iowa Code § 907.5 (1993). Impermissible factors considered by the district court in sentence determinations requires the sentence be vacated and a remand for resentencing. *See State v. Messer*, 306 N.W.2d 731 (Iowa 1981) (additional, unproven, and unprosecuted charges impermissible and require remand for resentencing); *State v. Thompson*, 275 N.W.2d 370 (Iowa 1975) (imposition of a severe sentence for a

lesser-included crime because facts supported a higher crime impermissible and requires remand for resentencing); *Thomas*, 520 N.W.2d 311 (consideration of early release under parole system impermissible and requires remand for resentencing despite other factors to support sentence).

Here, the factors specified by the district court to support the sentence imposed included Brooks' marital history. While a reference to the number of times a defendant has been married normally would not be a relevant factor in sentencing proceedings,[1] Brooks proffered her stormy marital relations as an explanation for her criminal history. She testified she was now in a stable relationship, which enables her to deal with her problems, and is a factor to consider for probation. As such, Brooks argued her marital history was a contributing factor to her criminal behavior. In light of this argument, we find her marital history to be a relevant and permissible consideration.

The district court addressed Brooks' explanation noting her criminal activity did not cease when she married her current husband. We find no abuse of discretion in considering Brooks' marital history for sentencing.

III. Presentence Report

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[1] Brooks argues the reference to marital history relates only to her character. We agree consideration of an unstable marital history which is not relevant to the charges or attending circumstances is impermissible. However, Brooks' marital history related directly to her explanation for her previous criminal history.

A district court must consider any information offered by the parties relevant to the question of sentencing. *Peters*, 525 N.W.2d at 859. *See also* Iowa Code § 901.2. The State contends Brooks had an opportunity to object to the inaccuracies and misstatements in the presentence investigation report at the sentencing hearing. We need not address this argument, since we find no abuse of discretion occurred in the district court's sentencing.

Brooks contends conflicts exist between the presentence investigation report and her testimony. She argues the report indicated she was a liar because it stated a reference had not heard Brooks' husband had been diagnosed with cancer and could not work. Brooks testified about the report and also discussed in detail her husband's illness.

The district court specifically found Brooks to be a liar. There is no indication, however, it relied upon the specific instance where Brooks was allegedly untruthful concerning her husband's illness. The report also indicated she had not been truthful with the investigator concerning her prior arrests, employment history, and background information. Moreover, we give deference to the district court's ability to weigh the credibility of witnesses. Iowa R. App. P. 14(f)(7). We find no abuse of discretion in the court's reliance on the report.

Brooks also contends the report was inaccurate concerning her economic status. She notes the report does not reflect the mortgage payments on her house, and indicates she is unemployed, yet receives a monthly income of $1528. The

sentencing record here reveals the district court did not rely on Brooks' economic status in determining sentencing. As such we find no abuse of discretion occurred.

AFFIRMED.