FILED
SEP 25 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

206

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

JERRY ALLEN TOLBERT,)

Defendant-Appellant.)

Filed September 25, 1984

4-322
83-1310

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

Defendant appeals the sentences imposed following his convictions for second-degree burglary in violation of Iowa Code sections 713.1 and 713.3 (sic) (1983) and assault with intent to inflict serious injury in violation of Iowa Code sections 708.1 and 708.2(1) (1983). AFFIRMED.

Charles Harrington, Appellate Defender, and Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Steven K. Hansen, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., Snell, and Hayden, JJ.

HAYDEN, J.

Defendant appeals the sentences imposed following his convictions for second-degree burglary in violation of Iowa Code sections 713.1 and 713.3 (sic) (1983),[1] and assault with intent to inflict serious injury in violation of Iowa Code sections 708.1 and 708.2(1) (1983). Defendant asserts that the trial court was under the false impression that incarceration was mandatory for the assault conviction when the assault was against a police officer, and, therefore, the trial court abused its sentencing discretion by failing to consider a suspended sentence. Defendant requests resentencing on both convictions, asserting that the allegedly improper sentencing on the asault conviction "tainted" the burglary sentence.

Our review of this criminal proceeding is at law for correction of errors only, and not de novo. Lopez v. State, 318 N.W.2d 807, 809 (Iowa Ct. App. 1982).

Iowa Code section 907.3 authorizes deferred judgments, deferred sentences and suspended sentences except in the case of forcible felonies. However, when an assault is committed against a peace officer, deferred judgments and sentences are not available to the sentencing court, but a suspended sentence is still permitted. Iowa Code § 907.3(1)(e).

Although there is evidence in this case that defense counsel mistakenly believed incarceration was mandatory, there is no evidence that the trial court was misled into the same belief. In stating the reasons for imposition of a sentence of incarceration, the trial court never mentioned section 907.3. The court stated its reasons as follows:

> Well, review of the presentence report, including the Defendant's criminal history and the prior felony convictions in this matter, would indicate to the Court that

---

[1] The record states on several occasions that defendant was charged with and convicted of burglary in the second degree in violation of Iowa Code section 713.3 (1983). We note, however, that due to a renumbering of subsections in the 1983 Code, second-degree burglary is found in section 713.5.

> the recommendation of the presentence investigation is an appropriate recommendation, and that the Defendant should be incarcerated for his convictions on this case.

The record indicates that the court reviewed its options and decided that incarceration was appropriate due to consideration of permissible factors such as defendant's prior convictions. See Iowa Code § 907.4. The trial court, therefore, imposed incarceration for valid reasons, not because it thought such a sentence was mandatory.

AFFIRMED.