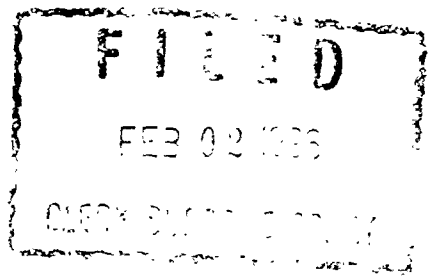
IN THE COURT OF APPEALS OF IOWA

No. 5-705 / 94-1774



STATE OF IOWA.

Appellee.

vs.

ROBERT M. BENBOW,

Appellant

Appeal from the Iowa District Court for Story County, Dale E. Ruigh, Judge.

Robert Benbow appeals the sentence imposed upon his conviction of incest.

AFFIRMED.

Ronald L. Wheeler, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden and Bridget Chambers, Assistant Attorneys General, and Mary E. Richards, County Attorney, for appellee.

Heard by Hayden, P.J., and Sackett and Huitink, JJ.

HUITINK, J.

Robert Benbow was charged with incest following allegations that he performed a sex act with his daughter. Benbow waived his right to a jury trial and agreed to submit his case to the court on the minutes of testimony attached to the trial information. The State agreed to recommend a suspended sentence and probation if Benbow was convicted.

The district court found Benbow guilty of incest and ordered the required presentence investigation. The presentence report recommended incarceration. The probation officer who prepared the report testified the recommendation was based on her belief that Benbow's refusal to admit his guilt necessitated inpatient treatment in a prison setting. The Story County Attorney recommended probation and counseling as earlier agreed. Benbow was sentenced to a term not to exceed five years.

On appeal Benbow claims the district court abused its sentencing discretion by refusing to suspend his prison sentence. Benbow also argues he was denied probation because he would not admit his guilt.

A district court's sentencing decision will not be disturbed unless there is an abuse of discretion or other defect such as the sentencing court's consideration of impermissible sentencing factors. *State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983). A defendant's failure to plead guilty is an impermissible sentencing consideration. *State v. Nichols*, 247 N.W.2d 249, 255 (Iowa 1976); *State v. Drake*, 224 N.W.2d 476, 479 (Iowa 1974).

Benbow's claim that the district court denied probation because he refused to admit his guilt is contradicted by the sentencing record. Contrary to Benbow's claims, we find the district court expressly rejected any requirement that Benbow admit guilt as a condition of probation. The district court stated:

> And I don't expect you at this time to change your plea from not guilty to guilty and to come before the court and do what many people would refer to as a mea culpa. I don't expect that at all, and I don't impose that as a requirement for putting anybody on probation.

Moreover, we are unable to find any such requirement implicit in any other remarks made by the district court at the sentencing hearing.

The minimal essential factors the sentencing court must consider at sentencing include the nature of the offense, the attendant circumstances, the defendant's age, character, propensities, and chances of reform. *State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979); *see* Iowa Code § 907.5. The sentencing record indicates the district court referred to and considered all of these factors. In addition, the district court carefully considered the alternative treatment options and found Benbow's chances of rehabilitation were better served by treatment while incarcerated.

We find no abuse of the district court's sentencing discretion or other defect requiring resentencing. The district court's judgment and sentence are therefore affirmed.

AFFIRMED.

Hayden, P.J., concurs; Sackett, J., concurs and concurs specially.

SACKETT, J. (concurring specially)

I concur with the majority opinion. I agree the trial court based its sentence on factors other than defendant's refusal to admit guilt. I write specially because I do not subscribe to the theory an alleged sex offender must admit guilt to be treated. When we adopt such attitudes, we do two things:

(1) If the person is an offender, we miss the opportunity to treat him or her. That treatment may ultimately lead to an admission of guilt; but even if it does not, the person will have been treated.

(2) We are not being realistic in demanding everyone admit guilt. Our system for determining guilt is not infallible and the alleged offender may, in fact, be innocent.