



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed February 23, 1983
vs.	)	
WILLIAM PAPPAS,	)	<u>2-273</u>
Defendant-Appellant.	)	67627

Appeal from Cerro Gordo District Court, M. D. Seiser, Judge.

The defendant, an attorney, appeals from his concurrent sentences for the crimes of perjury and theft in the first degree. He contends the trial court abused its discretion by sentencing him to imprisonment rather than probation.
REVERSED BUT NOT REMANDED.

Francis H. Becker of Patterson, Lorentzen, Duffield, Timmons, Irish & Becker, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General, and Richard L. Cleland, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

OXBERGER, C.J.

The defendant, an attorney, appeals from his concurrent sentences for the crimes of perjury and theft in the first degree. He contends the trial court abused its discretion by sentencing him to imprisonment rather than probation. We reverse but do not remand.

William Pappas, aged sixty-one, practiced law in Mason City for more than three decades. He served as county attorney for six years, between 1954 and 1960. As a result of some financially disastrous business deals, he became heavily indebted. He considered bankruptcy, but decided instead to attempt to pay his debts. In order to stave off foreclosure proceedings, he embezzled over \$5,000 from a conservatorship and took money from other funds that had been entrusted to him in amounts that added up to over \$33,000.

Pappas made complete restitution of all funds involved in these transactions. Most of the money was restored before the matter was discovered, and the remainder was restored before the pretrial investigation commenced.

Because he made false reports in connection with the conservatorship, he was charged with perjury as well as embezzlement.

A. The Plea Bargain

On August 24, 1981, pursuant to a plea bargaining agreement with the county attorney, Pappas entered guilty pleas to the theft and the perjury charges. The plea bargaining agreement provided, among other things, that the county attorney would recommend that Pappas receive a suspended sentence.

B. The Sentencing Hearing

On September 25, 1981, Pappas appeared in court for sentencing. At the hearing, the court heard evidence and considered the presentence report.

1. The Presentence Report

The presentence report noted that Pappas was reputed to be "one of the finest trial lawyers in the area," and that he was one of the few attorneys in the area who did a considerable amount of pro bono work. The report continued:

This officer does not believe that incarceration is warranted in this case. Mr. Pappas has suffered humiliation before his life-long home. Along with this, his license to practice law will more than likely be revoked sometime in October. However, this officer feels that Mr. Pappas should do more than undergo probation supervision. One possible option... would include community service in the Public Defender's office in Mason City. Another option available would be that of a fine. This officer sees that action as complicating a difficult financial situation, especially since he'll be losing his livelihood.

The report concluded by recommending that the court grant Pappas a suspended sentence and that he be placed on probation, with the condition that he give 300 hours of community service to the public defender's office in Cerro Gordo County.

In addition, the court heard from a number of persons, including colleagues in the legal profession, the captain of detectives of the Mason City Police Department, a banker, a psychologist, and others. Each of these persons recounted some of Pappas's numerous contributions to his community: his work for the Mental Health Center, his willingness to accept cases for minimal fees or for no fee at all, his readiness to render services at all hours of the night and day to clients who were in trouble, and his representation of members of the Mason City Police Department in civil service appeals without taking a fee, to cite a few examples.

2. The County Attorney's Recommendations

The county attorney stated that in his opinion it would be wrong to sentence Pappas to the penitentiary, despite his belief that it was important to hold lawyers to higher standards than nonprofessionals. He argued that a prison sentence would not accomplish any of the lawful goals of criminal penalties:

—Imprisonment would not be a meaningful deterrent to the community or to Pappas, he said, and the desired message would be adequately conveyed by the revocation of Pappas's license to practice law.

—Sentencing Pappas to the penitentiary had no meaningful relationship to a rehabilitative goal.

—As for retribution, the county attorney argued that that goal would be adequately met by Pappas's pleading guilty, being put on probation, and fulfilling the requirements imposed upon him during probation.

—Shock sentencing was inappropriate, he said, since it would serve only to degrade and demean Pappas and was inconsistent with the customary basis upon which other defendants were sentenced.

He concluded, therefore, by recommending that Pappas be given a suspended sentence and placed on probation.

3. The Sentence and the Court's Reasons for Imposing It

At the conclusion of the hearing, after considering the evidence and the recommendations, the court stated that he could not agree with the presentence report, since in his judgment a prison sentence was required in this case.

The court agreed that Pappas was no longer a threat to society, and that since Pappas was losing his livelihood, he would pay a great economic price for his crimes.

Then, after commenting upon the gravity of perjury and the embezzlement of a client's funds by an attorney, the court said: "If I give you a suspended sentence, society would construe that as a matter of the Courts or the bar taking care of their own." It was important, the court said, to convey a message to others—that perjury and embezzlement by attorneys would not be tolerated.

On these and other grounds the court then imposed sentences of not more than five years on the perjury charge and not more than ten years on the embezzlement charge, the sentences to run concurrently.

The issue on appeal is whether the court abused its discretion in imposing this sentence upon Pappas. We hold that the imposition of this sentence does

constitute an abuse of discretion, and we therefore reverse and modify the sentence imposed upon Pappas.

L. The Morrison Case Distinguished

Earlier this year, the supreme court affirmed the sentence imposed upon Ira Morrison, a former judge who had been convicted of extortion after pleading guilty to obtaining the services of a criminal defendant as a narcotics informant while Morrison was a district judge. State v. Morrison, 323 N.W.2d 254 (Iowa 1982). Morrison was sentenced to not more than five years confinement and a fine of \$1,000.

On appeal, Morrison contended that the trial court erred in failing to grant him probation, and more particularly that the court employed invalid criteria in denying him probation. In imposing the penalty upon Morrison, the trial court stated:

But long after your adjustment and acceptance, the stigma of your guilt will be a burden borne by our judicial system and every member past, present and future of this state's judiciary and will live and be perpetuated and forever weigh against all of those who faithfully and honestly execute their office of judge. You have done a terrible wrong to the people of this state and the punishment is set forth in the very statutes you swore to uphold. That punishment must be real and visible and not subject to misunderstanding by any who shall learn of its imposition.

Id. at 256.

The supreme court applied the standard enunciated in State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979). An abuse of discretion in a denial of probation will not be found unless the defendant shows "that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." In light of this standard, the court found that there had been no abuse of discretion since the offense was more serious because the defendant was a judge than it would have been had he been an ordinary citizen, and "seriousness of the offense

is an important sentencing consideration." The court went on to say that "[p]robation may be refused when it would unduly depreciate the seriousness of the crime," and in this case it was clear from the court's statement of reasons for denying probation that "this was the most significant but not exclusive sentencing factor. . . ." Morrison at 256-57.

A crucial consideration was the fact that Morrison was a judge at the time of the offense and that "[d]efendant's status was integral to the offense and its gravity." Id. at 256, emphasis added. Therefore, the court concluded, it was not unreasonable for the trial court to find that a "retributive sentence was warranted" for the defendant's crime. Id. at 257, emphasis added.

The principal factor that distinguishes Morrison from the instant case is the fact that in Morrison, the defendant's status was "integral to the offense and to its gravity." That is, if Morrison had not been a judge, he could not have committed the crime of attempting as a judge to extort services from a criminal defendant. And for that reason, it was appropriate for the supreme court to observe that a retributive punishment was warranted—i.e., one that is designed specifically to requite the wrongdoer for his crime, to inflict an evil upon him proportioned to the evil he had done, regardless of such utilitarian, forward-looking considerations as reform, rehabilitation, deterrence, and protection of the community against potential future harm from the same source.

In the instant case, however, Pappas's being a lawyer was not integral to the offenses which he committed. One need not be a lawyer to commit the offenses of embezzlement or perjury.

We therefore conclude that the considerations that led the supreme court to its conclusion in Morrison are not controlling in the instant case.

II. Sentencing Criteria and Abuse of Discretion

It goes without saying that an officer of the court ought to be held to high standards of conduct, and that appropriate sanctions ought to be brought to bear upon one who abuses such a position of trust. The legal profession has special sanctions which it imposes upon its members when they violate the sacred trust that is reposed in them. They are also subject to the sanctions imposed by the penal code when they violate its provisions, as are all other citizens. But the courts are required to follow the mandates of the Iowa Code in imposing sentences upon criminal defendants. They cannot ordinarily introduce considerations that are not provided for in the Code when determining what an appropriate sentence might be.

The Code provides that in determining which of the sentencing options to impose upon a given defendant, the court should determine which of them "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. . . ." Iowa Code § 901.5 (1981).

Similarly, in determining whether to defer judgment or suspend sentence, the court is required to determine

which option, if available, will provide maximum opportunity for the rehabilitation of the defendant and protection of the community from further offenses by the defendant and others. In making this determination the court shall consider the age of the defendant, the defendant's prior record of convictions and prior record of deferments of judgment if any; the defendant's employment circumstances; the defendant's family circumstances; the nature of the offense committed; and such other factors as are appropriate. . . .

Iowa Code § 907.5 (1981).

The imposition of a sentence for reasons other than those permitted by the Code, or the imposition of an excessive sentence, constitutes an abuse of discretion.

It is our statutory obligation to determine if a sentence is too severe. Iowa Code §§ 814.6, 814.20 (1981). The court has rarely exercised its power to examine the judgment of a trial court and to reduce the penalty when the court has found it to be improper or excessive. But on occasion it has done so, most recently in State v. Hubbs, 268 N.W.2d 188, 191 (Iowa 1978), in which the court reduced defendant's sentence from life in prison to twenty-five years on the ground that the penalty of life imprisonment was "clearly excessive."

In State v. Cupples, 260 Iowa 1192, 1197, 152 N.W.2d 277, 280 (1967), the court said:

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 reform. The courts owe a duty to the public as much as to defendant in determining proper sentence. The punishment should fit both the crime and the individual. 24 C.J.S. Criminal Law, § 1980.

See also State v. De Raad, 264 N.W.2d 108, 112-13 (Iowa 1969).

In response to a felt need to provide some objective basis upon which to determine whether a sentence imposed upon a defendant in a criminal case is appropriate, the General Assembly approved a rule imposing upon the sentencing court the affirmative duty to articulate the grounds upon which a particular sentence was imposed. Iowa R. Crim. P. 22(3)(d). See, e.g., State v. Luedtke, 279 N.W.2d 7, 8 (Iowa 1979); State v. Marti, 290 N.W.2d 570, 589 (Iowa 1980); State v. Worley, 297 N.W.2d 328 (Iowa 1980). See also State v. Horton, 231 N.W.2d 36, 40 (Iowa 1975)(special concurrence by McCormick, J., joined by Mason and Rawlings, JJ.); State v. Peckenschneider, 236 N.W.2d 344, 348 (Iowa 1975)(dissenting opinion by McCormick, J., joined by Mason, Rawlings, and Reynoldson, JJ.); and State v. Grgurich, 253 N.W.2d 605, 606 (Iowa 1977)(dissenting opinion of Reynoldson, J., joined by Rawlings, J.).

In sum, we are not only empowered by legislation and by precedent to determine whether a particular sentence is excessive or was imposed for the wrong reason; we are positively required to do so. And where we find that the trial court has abused its discretion, broad as that is, in imposing a particular sentence, then we are obliged either to reverse and remand or to modify the sentence in accordance with the law. Hubbs, supra.

III. The Public Opinion Criterion

The court, in relating its reasons for sentencing Pappas to a lengthy prison term said: "If I give you a suspended sentence, society would construe that as a matter of the Courts or the bar taking care of their own." That is, in addition to the general deterrent effect which the court hoped would result from sentencing Pappas to a lengthy prison term, a major factor in the sentence was the court's belief that anything less would bring the courts and the legal profession into disrepute, a belief founded upon no evidence in the record. We must now determine whether this is a legitimate ground upon which to base the sentence imposed by the court upon Pappas.

The judgment of a court of justice must be determined by principles and standards which are the same for all. When a defendant has entered a guilty plea to a crime with which he has been charged, elementary principles of justice require that the penalty assessed against him should be for the crime charged, and not for anything else. This is the very essence of the Due Process and Equal Protection clauses of the fifth and fourteenth amendments to the Constitution.

"Above all other principles to be considered now is the principle: The law of the land is supreme in the land; before the majesty of the law all men stand equal." United States v. Pendergast, 28 F. Supp. 601, 605 (W.D. Mo. 1939).

In the light of this great principle, it is impossible for us to suppose that our courts may wreak vengeance upon some defendant merely because the court presumes that public outcry may demand it. The majesty of the law may not be relegated to a public opinion poll, or worse, to what one imagines such a poll might reveal.

Under the "rule" enunciated by the court in the instant case, all men would not stand equal before the law, and some men would be punished, not only for the crimes of which they are convicted, but also because of the status they happen to enjoy in the community. Lawyers, who are already held to a higher standard of behavior than their fellow citizens and are subject to professional discipline by the Code of Professional Conduct and its sanctions, would also be required to pay a heavier penalty for their trespasses for no other reason than the fact that the courts are solicitous of the reputations of their judicial brethren and the members of the legal profession.

The imposition of sentence is the exercise of judicial power, discretion and judgment vested in a court. That function is not intended to be employed as an arbitrary power granted to a judge. [Citations.]... [I]t is an abuse of judicial discretion to impose additional punishment upon a defendant... as a warning or "barometer" to members of the Bar.

People v. Guiden, 5 A.D.2d 975, 172 N.Y.S.2d 640, 641-42 (App.Div. 1958.) This is not to say that it is wrong to employ penalties as deterrents to criminal behavior by members of the Bar. Nor is it inappropriate for the judiciary to be concerned about its public image and the esteem with which members of the Bar are held by the general public. If there is a public perception, or misconception, that judges and lawyers tend to favor members of their profession, it is highly desirable that corrective measures be taken. But it is completely inappropriate and unacceptable to victimize a particular person because he happens to be a lawyer in order to accomplish that appropriate objective.

Although the supreme court has not adopted the ABA sentencing standards, the principles upon which those standards are based are of universal application. We need not dwell upon them at length, for they are at the very foundation of our system of criminal justice. Those standards provide that a legitimate reason for total confinement in a given case might include the following:

- (i) Confinement is necessary in order to protect the public from further criminal activity by the defendant; or
 - (ii) The defendant is in need of correctional treatment which can most effectively be provided if he is placed in total confinement; or
 - (iii) It would unduly depreciate the seriousness of the offense to impose a sentence other than total confinement.
- On the other hand, community hostility to the defendant is not a legitimate basis for imposing a sentence of total confinement.

ABA standards, relating to Sentencing Alternatives and Procedures, § 2.5(c), 81 (1968), emphasis added.

The comment on the last sentence says that its purpose is "to emphasize that community uproar or hostility is not what is meant by (c)(iii). Public outcry is quite likely to be the least accurate measure of the appropriate disposition." Id. at 108, emphasis added.

In light of these principles, we conclude that the reason offered by the court for imposing the long prison terms upon Pappas does not comport with the principles of equal justice upon which our system is based. Nor does it comport with modern, enlightened thinking about the purposes of criminal punishment.

IV. The Sentence Imposed upon Pappas

Both defense counsel and the county attorney presented cogent reasons to the court against imprisonment and in favor of some lesser penalty. Those reasons were firmly grounded on the provisions of Iowa Code sections 901.5 and 907.5. The principal aims of punishment in this state are rehabilitation, protection of the community, and deterrence. The factors enumerated in section 907.5 cannot under any circumstances add up to a prison term for this defendant: his age, his

record, his employment circumstances, his family circumstances, and even the nature of the offense itself are not, in our judgment, sufficient to justify imprisonment in this case. Indeed, as the presentencing report and the county attorney, as well as the other witnesses urged, these factors lead to precisely the opposite result. In determining whether the sentence imposed upon him was excessive, we do not ignore the multitude of services he rendered his community over a period of four decades. Some nebulous public relations advantage for the judiciary and the legal profession should not be counted as one of "such other factors as are appropriate." On the contrary, that would be clearly inappropriate.

We therefore conclude that the court abused its discretion in imposing a lengthy prison sentence upon Pappas.

V. Conclusion

In light of the factors discussed above, it is our judgment that justice requires a reduction in the sentence imposed upon Pappas.

We see no need in this case to remand. For the sake of judicial economy, and following the precedent set in Hubbs and other cases, we reverse and modify the court's action by suspending the sentence imposed by the court upon Pappas and order him to perform 300 hours of appropriate community service in the public defender's office in Cerro Gordo County.

REVERSED BUT NOT REMANDED.