IN THE COURT OF APPEALS OF IOWA

No. 4-389 / 93-1928

STATE OF IOWA,

Plaintiff-Appellee,

vs.

DAVID G. HOXSEY,

Defendant-Appellant.

FILED
DEC 14 1994
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, James R. Havercamp, Judge.

David Hoxsey appeals from the sentence imposed after his guilty plea to the crime of indecent contact with a child. **AFFIRMED.**

John O. Moeller, Davenport, for appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, William E. Davis, County Attorney, and Joseph Grubisich, Assistant County Attorney, for appellee.

Considered by Donielson, C.J., and Hayden and Cady, JJ.

CADY, J.

Defendant David Hoxsey was charged with three counts of lascivious acts with a child, in violation of Iowa Code section 709.8 (1991). The charges arose from an incident on December 31, 1992. Hoxsey went to a residence where a female acquaintance, C.H., was babysitting three children, E.B., K.H., and P.H. The minutes of testimony indicated the children would testify Hoxsey took them into a bedroom where they observed Hoxsey and C.H. engage in sexual intercourse. They also stated Hoxsey asked each of them to touch C.H.'s vagina.

Hoxsey and the State entered into a plea agreement in which Hoxsey agreed to plead guilty to one count of indecent contact with a child, in violation of section 709.12. In exchange, the State agreed to dismiss the other two charges and to make no recommendation as to sentencing.

The presentence investigation recommended Hoxsey be sentenced to ninety days in jail. Hoxsey had previously been placed on probation for two misdemeanor charges in Texas and had completed his probation.

At the sentencing hearing, Hoxsey denied he was a sexual offender. He argued he should be placed on probation. The district court sentenced Hoxsey to a term of imprisonment not to exceed two years. The court stated:

> All right. Well, ignoring the factors that your Counsel has pointed out to the Court, you still have two prior convictions, two previous probations and a failure at rehabilitation. I determine that additional rehabilitative efforts

> in this community would not be worthwhile and are not justified in this case and probation is denied.

Hoxsey appeals his sentence.

A sentence will be disturbed by a reviewing court only upon a showing that the trial court abused its discretion. State v. Dicks, 473 N.W.2d 210, 215 (Iowa App. 1991). No abuse of discretion will be found unless the defendant shows such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. Id. Defendant has the burden of showing an abuse of discretion. State v. LeGrand, 501 N.W.2d 59, 64 (Iowa App. 1993).

Under section 901.5, when considering authorized sentencing options, a court should consider:

> 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.

In addition, when determining a proper sentence, a court should consider the nature of the offense, the attending circumstances, and the defendant's age, character, and propensities or chances for reform. State v. Johnson, 476 N.W.2d 330, 335 (Iowa 1991).

Hoxsey contends the district court abused its discretion in entering sentence against him. He claims the court erroneously found he had two prior probations which failed. Hoxsey states he, in fact, had only one probation, which he successfully completed. He also claims the court

failed to properly explain the particular sentence imposed or its failure to grant probation.

Indecent contact with a child is an aggravated misdemeanor, and the maximum allowable sentence is a term of imprisonment for two years and a $5,000 fine. See I.C. §§ 709.12, 903.1(2). The sentence imposed by the district court was authorized by statute.

We find Hoxsey did have two prior misdemeanor convictions and received two sentences of probation, although these probations ran concurrently. Furthermore, the district court did not state Hoxsey had two failed probations, but stated he had a failure at rehabilitation.

In addition, we find the district court properly explained the sentence imposed and its failure to grant probation. The court noted Hoxsey was not rehabilitated after his two previous probations, and found additional rehabilitative efforts in the community would not be worthwhile. We find ample support for this conclusion. Hoxsey denied he was a sex offender. It had been previously determined he was not eligible for the community sex offender treatment due to his denial.

In finding additional rehabilitative efforts in the community would not be worthwhile, the court was also taking cognizance of Hoxsey's attitude. Hoxsey did not admit his actions were wrong or were harmful to the children involved. He admitted only he "was in the wrong place at the wrong time."

We find no abuse of discretion in the sentence imposed by the district court in this case. We affirm the district court. Costs of this appeal are assessed to David Hoxsey.

AFFIRMED.