

FILED
FEB 26 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed February 26, 1980
vs.	)	
WILLIAM J. KAFKA, III	)	0-28
Appellant.	)	63961

Appeal from Johnson District Court - Joseph Thornton, Judge.

Defendant appeals judgment and sentence following his guilty plea to operating a motor vehicle under the influence of an intoxicant, in violation of section 321.281, The Code 1979. - Affirmed.

C. Joseph Holland, of Hayek, Hayek & Hayek, Iowa City, for appellant.

Thomas J. Miller, Attorney General of Iowa, and Shirley Ann Steffe, Assistant Attorney General, for appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant, William J. Kafka, III, appeals judgment and sentence following his guilty plea to operating a motor vehicle while under the influence of an intoxicant (OMVUI), in violation of section 321.281, The Code 1979. We affirm.

Kafka claims trial court placed an undue burden on him to show "compelling reasons" why deferred sentence was appropriate. The trial court reasoned since a deferred sentence would be expunged from a defendant's record after two years, the six year scope of the multiple offender provision of section 321.281, The Code 1979, would be limited to two years by judicial action.

We find State v. Peckenschneider, 236 N.W.2d 344, 347 (Iowa 1975) controlling. The court said "the granting of a suspended sentence and parole is a matter of grace, favor, or forbearance. It is not a matter of right." Id. The same rule applies to deferred sentences.

Although discretion not exercised constitutes an abuse of discretion, see State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979), the trial judge here exercised discretion. Kafka cites no authority for the proposition that imposition of an extra burden on a defendant to obtain the judge's favor is per se an abuse of discretion, and we deem the issue waived. Iowa R. App. P. 14(a)(3).

Kafka claims the legislature was aware of the effect of interaction between deferred sentences and multiple or habitual offender statutes and asserts the trial court's action is an undue interference with legislative prerogatives. Had the trial court said in all cases it would not grant deferred sentences because they reduced the six year period to two years, we might agree. However, that is not the case here. The trial court said it would consider "compelling reasons", and accordingly, exercised, rather than abused, its discretion.

Kafka also challenges the propriety of the sentence itself. The presentence investigator said: "I found absolutely no negative information at all in regard to Mr. Kafka and actually found him to be a very admirable, responsible person in just about — actually, in every aspect of his life." No circumstances aggravated the offense. Kafka was cooperative with the police, was not cited for any other traffic offense, and no personal injury nor property damage occurred. Although deferred sentence would have been proper, the sentencing here was within the trial court discretion. Again, we find Peckenschneider controlling and, therefore, affirm the trial court.

AFFIRMED.