

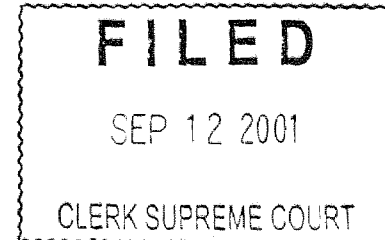
IN THE COURT OF APPEALS OF IOWA

No. 1-453 / 00-1427
Filed September 12, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KIM K. KIRKLAND,
Defendant-Appellant.



Appeal from the Iowa District Court for Clarke County, Darrell J. Goodhue,
Judge.

Kim Kirkland appeals the district court's sentence imposed following her
plea of guilty to first-degree theft. **AFFIRMED.**

Alfredo Parrish and Ivy Ross Rivello of Parrish, Kruidenier, Moss, Dunn,
Montgomery, Boles & Gribble, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney
General, and John D. Lloyd, County Attorney, for appellee.

Considered by Huitink, P.J., and Miller and Hecht, JJ.

MILLER, J.

Kim M. Kirkland appeals the district court's sentence imposed following her plea of guilty to theft in the first degree. She contends the district court (1) abused its discretion in sentencing her to an indeterminate ten-year sentence by relying solely on the nature of the offense and even then misconceiving the nature of the offense; and (2) impermissibly relied upon unprosecuted and unproven conduct when sentencing her. She also claims she was denied effective assistance of counsel at sentencing. We affirm.

I. BACKGROUND FACTS

Kim Kirkland worked as the administrator for South Central Home Health Care (SCHHC). Kirkland was in debt and at times in the past had written bad checks to cover expenses for herself and her three children. In a period of time spanning over a year, Kirkland diverted approximately \$24,800.00 from SCHHC funds for her own use by endorsing and depositing checks written by patients into her own account. Kirkland was charged with theft in the first degree in violation of Iowa Code sections 714.1(2) and 714.2(1) (1999) based on such actions. Prior to the events that gave rise to this charge, Kirkland had a criminal record consisting of at least seven convictions for various degrees of misdemeanor theft between 1986 and 1999.

On June 29, 2000 Kirkland appeared before the court and entered a plea of guilty to first-degree theft, withdrawing her previous plea of not guilty. A sentencing hearing was held on August 24, 2000. The State presented one witness, Stan Mr. Bircham, the owner of SCHHC and the person who hired Kirkland. Mr. Bircham testified on the issue of restitution. He sought restitution

not only for the funds Kirkland had converted to her own use which were involved in the pending criminal charge, but also for other losses he claimed SCHHC had incurred as a result of other acts and omissions of Kirkland while employed by SCHHC. He asserted these other losses occurred as a result of Kirkland falsifying records so an employee would have certain medical expenses covered by SCHHC's self-insurance and forging signatures in order to collect Medicare and Medicaid benefits for ineligible patients.

Mr. Birchem also prepared a written itemization of the amounts he claimed to have lost as a result of Kirkland's actions. It was offered as State's Exhibit 1 at the sentencing hearing. The itemization included not only the amount of funds Kirkland had converted and for which she was charged, but also losses and expenses Mr. Birchem claimed to have incurred as a result of Kirkland's other alleged acts and omissions. Mr. Birchem did, however, acknowledge that the only amount Kirkland had actually taken was \$24,800 in what he described as "Lost Client Checks." When questioned directly by the court regarding the specific amounts on the itemization Mr. Birchem acknowledged that figures other than the \$24,800 were losses and expenses alleged to have been incurred as a result of acts and omissions other than those giving rise to the pending criminal charge.

The State recommended incarceration and payment of restitution to her former employer in the amount listed in Exhibit 1, presumably the full amount which included losses and expenses unrelated to the criminal charge. Kirkland requested a suspended sentence and formal probation for two years and that restitution be for the \$24,800 of company checks she had converted to her use,

as that was the amount involved in the theft charge. The court sentenced her to imprisonment for a term not to exceed ten years and ordered her to pay restitution in the amount of \$24,800. In stating its reasons for the sentence and amount of restitution the court stated:

The Court has considered your request for probation. The Court does not feel probation is appropriate in this case.

I understand that you love your children. I understand the children love you. I don't know what kind of a role model that you are presenting for them, but it doesn't look very good to the Court. You have had consistent petty theft charges. As pointed out by the county attorney in this case, you perpetrated a fraud on one of the most vulnerable groups of our society, the elderly. And I don't believe under these circumstances that probation is appropriate.

. . . .

To explain to the victim my thinking on assessing on only the \$24,800, this is the amount of the funds that I understand that the defendant actually received. The rest of these damages I consider consequential damages. They may be the subject of a civil suit. I think in part they were the result of a lack of supervision and training on your part. And I don't think that they are appropriate to assess them against this defendant.

Kirkland appeals from the judgment and sentence entered against her by the district court.

II. SCOPE AND STANDARDS OF REVIEW

Our review of sentencing decisions is for correction of errors at law. Iowa R. App. P. 4. We review for an abuse of discretion or for defects in the sentencing procedure. *State v. Cason*, 532 N.W.2d 755, 756 (Iowa 1995). Sentencing decisions of the district court are cloaked with a strong presumption in their favor. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). A sentence will not be upset on appeal unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure, such as a consideration

of an impermissible factor. *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000); *State v. Gonzalez*, 582 N.W.2d 515, 516 (Iowa 1998). When the trial court considers an improper sentencing factor, remand for resentencing is required. *State v. Carrillo*, 597 N.W.2d 497, 501 (Iowa 1999).

The general rule of requiring error preservation is not ordinarily applicable to void, illegal or procedurally defective sentences. *State v. McCright*, 569 N.W.2d 605, 608 (Iowa 1997); *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). A defendant is not required to raise an alleged sentencing defect in the trial court in order to preserve a right of appeal on that ground. *State v. Dann*, 591 N.W.2d 635, 637 (Iowa 1999); *State v. Wilson*, 294 N.W.2d 824, 826 (Iowa 1980).

III. MERITS

Kirkland contends on appeal that the court abused its discretion in sentencing her to a ten-year prison sentence because the court relied solely on the nature of the offense, and even mischaracterized the nature of the offense, believing the victims to be the elderly clients of Kirkland's employer rather than her employer itself. Kirkland further argues the court impermissibly relied upon unprosecuted and unproven conduct in sentencing her, based on the testimony given by Mr. Birchem regarding her alleged involvement in Medicare fraud, insurance fraud, forgery, and assisting an employee in defrauding the company. Kirkland also asserts she was denied effective assistance of counsel at sentencing because her counsel failed to object to Mr. Birchem's testimony regarding the additional alleged misconduct and failed to correct the court's

misconception of the victim and nature of the crime. We will address the sentencing and ineffective assistance claims separately.

A. Abuse of Discretion in Sentencing

Iowa Rule of Criminal Procedure 22(3)(d) requires a sentencing court to "state on the record its reason for selecting the particular sentence." Failure to state on the record the reasons for the sentence imposed requires the sentence be vacated and the case remanded for amplification of the record and resentencing. *State v. Marti*, 290 N.W.2d 570, 589 (Iowa 1980); *State v. Mai*, 572 N.W.2d 168, 170 (Iowa Ct. App. 1997). "A statement may be sufficient, even if terse and succinct, so long as the brevity of the court's statement does not prevent review of the exercise of the trial court's sentencing discretion." *State v. Johnson*, 445 N.W.2d 337, 343 (Iowa 1989); *see also State v. Oliver*, 588 N.W.2d 412, 414 (Iowa 1998).

When a sentence is not mandatory, the district court must exercise its discretion in determining what sentence to impose. The district court must demonstrate its exercise of discretion by stating upon the record the reasons for the particular sentence imposed. The sentencing court, however, is generally not required to give its reasons for rejecting particular sentencing options.

Thomas, 547 N.W.2d at 225 (citations omitted). In applying discretion, the court

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 his reform. The courts owe a duty to the public as much as to defendant in determining a proper sentence. The punishment should fit both the crime and the individual.

State v. August, 589 N.W.2d 740, 744 (Iowa 1999) (quoting *State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979)). Our supreme court has stated that the above factors are some of the "minimal essential factors" to be considered when

exercising sentencing discretion. *Hildebrand*, 280 N.W.2d at 396. “The nature of the offense alone cannot be determinative of a discretionary sentence.” *State v. Dvorsky*, 322 N.W.2d 62, 67 (Iowa 1982) (citing *State v. McKeever*, 276 N.W.2d 385, 387 (Iowa 1979)).

In determining whether the trial court considered pertinent matters in imposing a particular sentence, we look to all parts of the record to find supporting reasons. *State v. Boltz*, 542 N.W.2d 9, 11 (Iowa Ct. App. 1995); *State v. Delaney*, 526 N.W.2d 170, 178 (Iowa Ct. App. 1994). The record includes not only reasons stated during the sentencing hearing, but also reasons given in the written judgment entry. *State v. Lumadue*, 622 N.W.2d 302, 304 (Iowa 2001).

The trial court stated it was adjudging Kirkland guilty of “first degree theft.” In its written judgment it identified the relevant Code sections as 714.1(1) (theft by misappropriation) and 714.2(1) (theft in the first degree). It thus clearly and correctly identified and considered the nature of the offense.

Kirkland asserts the trial court’s reference to perpetration of a fraud on the elderly showed that the trial court relied in part on an incorrect understanding of the nature of the offense. We do not agree. The record clearly shows that Kirkland’s actions resulted in elderly clients of her employer not receiving credit for payments they made for services rendered. We view the trial court’s statement as merely recognizing this indirect consequence of Kirkland’s actions and thus going to the “attending circumstances” of her crime, an appropriate and necessary sentencing consideration. Any remaining suggestion that the trial court considered someone other than SCHHC to be the victim of Kirkland’s crime is refuted by its written judgment entry. The judgment entry orders that victim

restitution be paid to SCHHC, and does not order it paid to any other individual or entity.

The trial court did not expressly identify and consider Kirkland's age. However, the record made at the sentencing hearing shows the trial court was aware she had at least three children and a lengthy record of theft convictions. Further, the written judgment notes the trial court had considered the "presentence investigation [report]." The report showed that Kirkland was forty-three years of age, was the divorced mother of four dependents, and had theft convictions going back to 1986. The trial court was thus aware of and considered the fact Kirkland was a mature adult. It thus gave at least some consideration to her "age" even if it did not expressly state her exact age or birth date on the record during the sentencing hearing.

Kirkland's character, propensities, and chances for reform are shown by her age, criminal record of numerous theft convictions over a period of some twelve years, and family circumstances, all of which are shown by the record and were considered by the trial court.

Although the trial court's statement of reasons for the sentence it imposed was terse and succinct, we conclude it did not rely on the nature of the offense alone, but rather did consider at least the minimal essential factors necessary to support its sentencing decision. We further conclude it did not rely on an incorrect understanding of the nature of the offense.

B. Consideration of an Impermissible Factor

Kirkland's second claim is that the trial court impermissibly relied upon unprosecuted and unproven conduct in determining her sentence, based on the

testimony of Mr. Birchem regarding other alleged conduct by her such as Medicare fraud, insurance fraud, and forgery. Mr. Birchem did testify regarding losses and expenses incurred by SCHHC as a result of certain alleged acts and omissions by Kirkland, including acts and omissions not involved in the pending criminal charge, and offered an itemization of those losses and expenses. However, the State expressly called Mr. Birchem to testify solely on the issue of restitution. Further, in discussing the reasons for the sentence and amount of restitution the trial court made it clear it believed any amounts other than the \$24,800 involved in the checks misappropriated by Kirkland were unrelated to the charge and refused to consider restitution beyond the \$24,800.

We find no substantial evidence in the record that the court relied on any unproven or unprosecuted conduct testified to by Mr. Birchem in determining Kirkland's sentence. To the contrary, the trial court explicitly considered only her misappropriation of the checks, the crime with which she was charged and to which she had pled guilty.

C. Ineffective Assistance

Finally, Kirkland argues on appeal that her attorney was ineffective for failing to object to the improper assertions of the county attorney or correct the court's misconception. The "improper assertions" concern Kirkland's other unprosecuted and unproven conduct. The "misconception" is the trial court's alleged belief that elderly persons were the victims of Kirkland's crime.

A defendant is entitled to the assistance of counsel under the Sixth Amendment of the United States Constitution and Article 1, section 10 of the Iowa Constitution. The right to counsel is a right to effective assistance of

counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 692 (1984). Because a claim of ineffective assistance of counsel implicates constitutional rights, we review de novo the totality of the circumstances surrounding counsel's representation of the defendant. See *State v. Carter*, 602 N.W.2d 818, 820 (Iowa 1999); *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987).

To establish an ineffective assistance of counsel claim, the defendant must show "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *Wenmark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). A reviewing court may look to either prong to dispose of an ineffective assistance claim. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). The defendant has the burden of proving by a preponderance of the evidence both of the two elements of a claim of ineffective assistance. *Ledezma v. State*, 626 N.W.2d 134, 142, 145 (Iowa 2001); *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996); *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989).

An ineffective-assistance-of-counsel claim may be disposed of if the defendant fails to prove either of the two prongs of such a claim. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we need not determine whether counsel's performance is deficient before undertaking the prejudice determination. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). In order to prove prejudice the defendant must show a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698. "A 'reasonable probability is a probability sufficient to undermine confidence in

the outcome' of the defendant's trial." *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997) (quoting *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986)).

While we often preserve ineffective assistance claims for possible postconviction proceedings, we consider such claims on direct appeal if the record is sufficient. *State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999). Neither party suggests we should preserve Kirkland's ineffective assistance claims for postconviction proceedings and we believe the record is adequate to address her claims.

The prosecuting attorney did offer and introduce irrelevant evidence at the sentencing hearing, the testimony of Mr. Bircham concerning unprosecuted acts by Kirkland which were not involved in the pending charge. However, the record does not indicate the trial court in any manner relied on or considered such conduct in imposing sentence. Further, for reasons stated earlier in this opinion it is clear the trial court did not harbor a misconception as to the identity of the victim of Kirkland's crime. Even if defense counsel breached an essential duty by failing to object to the evidence of Kirkland's unprosecuted and unproven conduct, by failing to object to the prosecuting attorney's characterization of the elderly as victims of the crime, or both, Kirkland has shown no resulting prejudice.

IV. CONCLUSION

For all of the reasons set forth above, we find the district court did not err in sentencing Kirkland to an indeterminate ten-year term. The court did not abuse its discretion by relying solely on the nature of the offense. It did not rely on unproven or unprosecuted conduct by Kirkland. It did not act under a

misconception as to the identity of the victim or victims of the crime. We further find Kirkland has not shown that she was denied effective assistance of counsel during sentencing in violation of her constitutional rights. The sentence imposed by the district court is affirmed.

AFFIRMED.

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