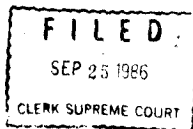


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed September 25, 1986

203

vs

)

JOHNNY EDWARD JOHNSON,

)

6-247
85-1442

Defendant-Appellant.

)

Appeal from the Iowa District Court for Scott County (No. 118661-01)

- Margaret S. Briles, Judge.

Defendant appeals from judgment and sentence entered by the trial court after defendant pled guilty to assault with intent to commit sexual abuse in violation of Iowa Code section 709.11. **AFFIRMED.**

Michael S. Bennett, Davenport, for defendant-appellant.

Thomas J. Miller, Attorney General; Rebecca L. Claypool, Assistant Attorney General; and R. Douglas Wells, Assistant County Attorney, for plaintiff-appellee

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J.

Defendant appeals *from judgment and sentence* rendered by the trial court after the defendant pled guilty to a charge of assault with intent to commit sexual abuse in violation of Iowa Code section 709.11 (Iowa 1983). Defendant contends the trial court abused its discretion in denying his application for a deferred judgment and sentence pursuant to Iowa Code section 907.3 (1983). We affirm.

Defendant Johnny Edward Johnson was originally charged with the crime of lascivious acts with a child in violation of Iowa Code section 709.8 after admitting to an incident of indecent contact between himself and his oldest daughter, then age 9, which occurred in Davenport in 1983. After further investigation, the charge was changed to assault with intent to commit sexual abuse in violation of Iowa Code section 709.11, to which Johnny eventually pled guilty. Pursuant to Iowa Code section 907.3, Johnny then applied for a deferred judgment and sentence.

At the sentencing hearing Johnny presented several arguments and witnesses to support his claim that he was an appropriate candidate for a deferred judgment and sentence. Johnny drew to the court's attention the facts that he had never before been convicted of a serious crime, that he and his family were deeply involved in a therapy program, and that he had an excellent work history. Johnny's family consists of his second wife and four daughters: two from Johnny's prior marriage, one from his second wife's prior marriage, and one born to the parties. Johnny's work history includes fourteen years of employment with the U.S. government, first in Rock Island, Illinois, and later, at the time these charges were filed, at Huntsville, Alabama.

Despite the evidence presented in support of Johnny's application for a deferred judgment and sentence, the trial court denied the application and

sentenced him to a two-year term of incarceration. The reasons given by the trial court for imposing the sentence included the right of the victim to be vindicated, the revolting nature of the crime of intrafamily sexual abuse, the need to deter other fathers in similar situations from such conduct, and the need to deter Johnny from future criminal conduct toward his four young daughters. After reviewing a psychological profile and other psychiatric evaluations, the trial court stated that it believed Johnny would not be deterred by a punishment other than incarceration.

Our scope of review is correction of errors at law. Iowa R. App. P. 4. A sentence will not be disturbed by a reviewing court unless the defendant demonstrates an abuse of discretion or a defect in the sentencing procedure, such as the trial court's consideration of impermissible factors. State v. Wright, 340 N.W.2d 590, 592 (Iowa 1983). An abuse of discretion appears only when it has been demonstrated that the discretion exercised by the trial court was based on grounds or for reasons clearly untenable or to an extent clearly unreasonable. State v. Myers, 382 N.W.2d 91, 93 (Iowa 1986). Generally, sentencing decisions of the trial court are cloaked with a strong presumption in their favor, and, until the contrary appears, the presumption is that the discretion of the trial court was rightfully exercised. State v. Hansen, 344 N.W.2d 725, 730 (Iowa Ct. App. 1983).

The defendant contends that the trial court did not properly weigh the favorable recommendations of the presentence investigation report, but rather vengefully based its decision on the nature of the offense. We disagree.

The presentence report revealed that defendant never before had been convicted of a felony or any other serious criminal activity; his prior record consisted of a speeding ticket. The report also showed that the family was involved and committed to defendant's therapy programs and that the defendant

would likely refrain from further sexual assaults. Defendant also has a long history of employment with the United States government, working first at the Rock Island Arsenal, Rock Island, Illinois, and at the time the charge was filed at the Redstone Arsenal in Huntsville, Alabama. There are four children in defendant's family, two from defendant's previous marriage, one from his wife's previous marriage, and one which the couple had together.

Defendant's wife testified that in order to protect their daughters from any further sexual assaults, the daughters are never left alone with the defendant. She testified that all the children were attending school and performing quite well.

The trial court, however, was not convinced that the wife could still protect their daughters from a future sexual assault. The defendant contends that the trial court based its judgment on the following grounds: (1) a vague inference to a University of Iowa psychologist; (2) a psychological evaluation done nine months prior to sentencing, when defendant first admitted himself to a hospital for treatment; and (3) an attitude on the court's part that defendant terms vengeful when it attempted to vindicate the assaulted daughter's rights. The record of the hearing, however, reveals that the trial court allowed the defendant and his counsel ample opportunity to speak in mitigation of punishment and questioned the parties at length about defendant's present family life, the effects of defendant's crime upon his young daughter, and what steps had been taken to prevent further sexual assaults. In rendering its decision, the court noted the revolting nature of intrafamily sexual abuse and also noted that other fathers similarly situated to the defendant needed to be deterred. Based upon defendant's psychological profile, the court found that while defendant did not appear to exhibit psychotic problems, defendant's profile indicated "very little ego strength" and "marked tendencies toward acting out," and that placing defendant on proba-

tion would not ensure that future assaults would not occur. The trial court also was unsure whether the facilities available to defendant in Alabama would be adequate to treat the defendant.

Although factors *may have existed* which would have supported a decision to grant a deferred judgment, we believe that the trial court *did not* abuse its discretion in sentencing defendant to a term not to exceed two years. The trial court's decision was not so palpably and grossly violative of fact and logic that it evidences *not* exercise of will but perversity of will, not evidence of judgment but defiance thereof. State v. Noonan, 246 N.W.2d 236, 237 (Iowa 1976). See State v. Hildebrand, 280 N.W.2d 393, 395 (Iowa 1979) (trial court, in denying a motion for deferred sentence, stated "I have the policy that when there is an accident involved, I do not and will not grant a deferred sentence.")

AFFIRMED.