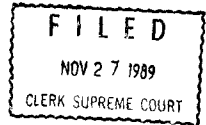


IN THE COURT OF APPEALS OF IOWA

No. 9-452 / 88-1756



STATE OF IOWA,

Appellee,

vs.

DOUGLAS K. LINDAMAN,

Appellant.

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Appeal from the Iowa District Court for Mitchell and
Floyd Counties, Dale Ruigh, Judge.

Defendant appeals the convictions and sentences imposed
upon him following his guilty pleas on two counts of
lascivious acts with a child. **AFFIRMED, SENTENCE VACATED
AND REMANDED FOR RESENTENCING.**

Douglas K. Lindaman, appellant, pro se.

Thomas J. Miller, Attorney General; Roxann M. Ryan and
Virginia Barchman, Assistant Attorneys General; and Bryan
McKinley, Assistant County Attorney, for the appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

PER CURIAM

Defendant Douglas K. Lindaman appeals his convictions and sentences imposed following his guilty pleas on two counts of lascivious acts with a child. Defendant raises a number of issues challenging the validity of his guilty pleas and sentences. We affirm but remand for resentencing.

Defendant was initially charged by trial information with one count of third-degree sexual abuse and one count of lascivious acts with a child for unrelated incidents occurring in Floyd County. The victims involved in the Floyd County charges, respectively, were C.B. and A.H. Defendant was also charged with one count of lascivious acts with A.H. for an incident occurring in Mitchell County. A.H., at that time, was an eleven-year-old boy.

Pursuant to a plea bargain, defendant subsequently pled guilty to one count of lascivious acts with the child, A.H., in Mitchell County and one count of lascivious acts with A.H. in Floyd County. As a result of the plea bargain, the charge against defendant of lascivious acts with C.B. was dismissed. The district court sentenced defendant to serve five years on each count, with the sentences to run consecutively.

Our scope of review is on errors assigned. Iowa R. App. P. 4.

The court fully informed defendant, pursuant to Iowa Rule of Criminal Procedure 8(2)(d), on how to challenge defects in the plea proceedings by filing a motion in arrest of judgment and the appellate consequences of failing to do so. The defendant did not file such a motion.

The defendant's failure to challenge the plea proceeding precludes him from challenging the adequacy of that proceeding. Iowa R. Crim. P. 23(3)(a); see State v. Tussing, 340 N.W.2d 257, 258 (Iowa 1983). This disposes of those claims made by the defendant on appeal that should have been timely raised by a motion in arrest of judgment.

Defendant also raises several issues with respect to his sentencing. In this respect, the State at the time of sentencing introduced, over defendant's objection, a victim impact statement from C.B. and his family. He asserts the trial court erred in considering that statement.

The criminal charge in which C.B. was the complainant was dismissed pursuant to the plea bargain. The Iowa Supreme Court held in State v. Black, 324 N.W.2d 313, 315 (Iowa 1982): "We will set aside a sentence and remand a case to the district court for resentencing if the sentencing court relied upon charges of an unprosecuted offense that was neither admitted by the defendant nor otherwise proved."

From the record before us, we conclude that the unprosecuted offense in this matter was neither admitted by defendant nor otherwise proved. We must next determine whether the sentencing court relied on the charges of the unprosecuted offense.

The trial court made an exemplary record during the course of sentencing. He explained in detail the reasoning of the court for its sentencing decisions and why consecutive sentences were imposed. Thus far, we do not believe the sentencing process was tainted.

But, as it relates to the statement of C.B. and his family (the dismissed case), the appellant directs our attention to the comment made by the trial court that he believed the document was appropriate to consider. Although we feel the statement by C.B. and his family had no impact on the sentences imposed, we cannot, as was the case in State v. Messer, 306 N.W.2d 731, 733 (Iowa 1981), "speculate about the weight trial [sic] court mentally assigned this factor, or whether it tipped the scales to imprisonment."

Thus, we remand this case to the district court for resentencing without consideration of the dismissed charge nor the impact statement of the victim and his family that arises from it. We, of course, do not suggest what the sentence should be.

The defendant apparently claims that he was denied effective assistance of counsel because his attorney failed to properly advise him as to a diminished responsibility defense. As the defendant notes, he was aware of this defense before sentencing. When we review the record, we find that the defendant is unable to show that counsel was ineffective. In order to prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel breached an essential duty and that the defendant was thereby prejudiced. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). Ordinarily such claims are reserved for postconviction relief when counsel has an opportunity to provide a full and complete record. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978).

The defendant has failed to demonstrate that any essential duty was breached because he has not demonstrated that any diminished responsibility defense would be available to him based on his "mental illness." Nor has he shown that he was prejudiced in any way. It cannot go unnoticed that the defendant admitted at the guilty plea proceedings that he had in fact formulated the requisite intent for the crime committed.

Since the defendant has failed to make a prima facie showing of ineffective assistance of counsel, it is not necessary to reserve the issue for postconviction relief. Thus, this issue is now resolved adversely to the defendant.

The defendant also argues that section 709.8 is unconstitutionally vague and that Chapter 709 is irrational. The record does not show that these objections were raised at any other time prior to appeal.

The Iowa Supreme Court in State v. Moorhead, 308 N.W.2d 60, 64 (Iowa 1981), stated:

"We have held that 'in order to preserve for review any alleged error in ruling on the constitutionality of a statute, the party challenging the statute must do so at the earliest available opportunity in the progress of the case.'" State v. Allen, 304 N.W.2d at 206 (quoting State v. Ritchison, 223 N.W.2d 207, 214 (Iowa 1974)). Matters not raised before the trial court cannot be raised for the first time on appeal, State v. DeBerg, 288 N.W.2d 348, 351 (Iowa 1980), including constitutional issues, State v. Holmes, 276 N.W.2d 823, 828 (Iowa 1979).

The defendant next argues that the court abused its discretion in ordering consecutive sentences of incarceration. The governing principles of law are well settled. "[W]hen a sentence is imposed within statutory limits, it will be set aside only for an abuse of discretion. Ordinarily an abuse of discretion will be found only where there is no support for the decision in the record." State v. Gibb, 303 N.W.2d 673, 687 (Iowa 1981) (citation omitted).

Abuse of discretion means "'that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982) (quoting State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979)). The minimum essential

factors that a court must consider are: the nature of the offense; the attendant circumstances; and the defendant's age, character, propensities, and chances of reform. State v. Dvorsky, 322 N.W.2d 62, 67 (Iowa 1982).

A sentence within statutory limits will be set aside only for an abuse of discretion, even if the sentence chosen is the most severe alternative available. State v. Farnum, 397 N.W.2d 744, 749 (Iowa 1986). In exercising its discretion, the trial court is required to determine which sentencing options are authorized "and of the authorized sentences, 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 the protection of the community from further offenses by the defendant and others." Iowa Code § 901.5 (1981). As we pointed out earlier in this opinion, the trial court gave each of these options careful and painstaking consideration. We are satisfied that the trial court did not abuse its discretion.

It is equally clear to us that the trial court did not punish the defendant because he is a homosexual. The record clearly establishes that the trial judge imposed those sentences because the defendant pled guilty (and an adjudication of guilt was entered) to two counts of lascivious acts with a child. The record is conclusive that the defendant's sexual preference, as it relates to

the crimes committed, was interjected in the district court proceedings by the defendant at the time he addressed the court. The trial judge, in its order¹ of February 3, 1989, stated as follows:

The defendant seemingly argues or believes that the Court sentenced him to incarceration solely because of his sexual preference. Such is not the case and the Court so indicated during the sentencing hearing. Mr. Lindaman has stated several times that he is a homosexual. He has been convicted of two charges of lascivious acts with a child, in violation of Iowa Code Section 709.8. That statute prohibits various sexual contacts between an adult and a child, regardless of the adult's sexual orientation. Mr. Lindaman has been convicted and sentenced to incarceration in this case, not because of his status as a homosexual, but because he had statutorily prohibited sexual contact with a child. Contrary to the defendant's belief, the Court's sentencing decision did not turn on whether Mr. Lindaman was of any particular sexual orientation.

We have thoroughly examined all of defendant's assignments of error and except for our remand order, we find them to be without merit.

We affirm the trial court, but vacate the sentence.

AFFIRMED AND REMANDED FOR RESENTENCING.

1. This order denied defendant's reconsideration request where the same assertion was made.