

**FILED**

JAN 31 1978

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

|                |   |                        |
|----------------|---|------------------------|
| STATE OF IOWA, | ) |                        |
| Appellee,      | ) | Filed January 31, 1978 |
| vs.            | ) |                        |
| JIM MCCARTHY,  | ) | <u>387</u>             |
| Appellant.     | ) | 60737                  |

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Appeal from Warren District Court - Luther T. Glanton, Jr., Judge.

Defendant appeals seven year indeterminate sentence for false uttering of a check asserting trial court abuse of discretion. - Affirmed.

William M. Murray and Charles J. Davoren, of Bertroche & Hagen, Des Moines,  
for Appellant.

Richard C. Turner, Attorney General of Iowa, Ray Sullins, Assistant Attorney  
General and John W. Criswell, Warren County Attorney, for Appellee.

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

## PER CURIAM

Defendant Jim McCarthy appeals his seven year indeterminate sentence for false uttering of a check in violation of § 713.3, The Code. Defendant pled guilty as charged. He attempted to convince the trial court at the sentencing hearing the check was a bad business judgment rather than an intentionally criminal act and therefore deserving of a suspended sentence. Defendant was sentenced to an indeterminate seven year term at the Mens Reformatory at Anamosa. On appeal McCarthy contends the trial court abused its discretion by allegedly finding him ineligible as a matter of law for a suspended sentence and by sentencing him as a result of pressure from the press rather than by considering all relevant factors.

The thrust of defendant's argument is the trial court abused its discretion in sentencing him to the indeterminate seven year term rather than giving him a suspended sentence. In Iowa the rules regarding the review of sentencing are clear. So long as the sentence is within the statutory maximum, the reviewing court will not reverse absent an abuse of discretion. *State v. Grgurich*, 253 N.W.2d 605, 606 (Iowa 1977); *State v. Noonan*, 246 N.W.2d 236, 237 (Iowa 1976); *State v. Smith*, 244 N.W.2d 325, 327 (Iowa 1976). The maximum statutory sentence for false drawing or uttering in violation of § 713.3 is an indeterminate sentence of not more than seven years in the state penitentiary. See § 713.1, The Code. Unless the trial court abused its discretion, defendant's sentence must be upheld.

Abuse of discretion is not itself reviewable. It is only the alleged abuse of that power which is reviewable on appeal. Generally abuse of discretion will be found only where there is no support for the decision in the evidence. *Noonan*, *supra*. See also *State v. Warner*, 229 N.W.2d 776, 783 (Iowa 1976). Abuse of discretion ordinarily means no discretion to do what was done. *Wilkes v. Iowa State Highway Commission*, 186 N.W.2d 604, 607 (Iowa 1971). The term discretion itself involves the idea of choice, of an exercise of will, of a determination made between competing considerations. *Warner*, *supra*.

Defendant argues the trial court abused its discretion in sentencing because it was under the mistaken belief that it could not give a suspended sentence as a matter of law when in fact § 789A.1(2), The Code, provides for such a result. Cf. *State v. Robbins*, 257

N.W.2d 63, 69-70 (Iowa 1977). The following exchange occurred at a hearing on defendant's application for court appointed counsel on appeal and for a transcript, at public expense.

THE COURT: Mr. Murray, with a record like that what would you expect the court to do?

MR. MURRAY: Your Honor, I think under the circumstances that we had, the mitigating circumstances, I would expect a suspended sentence.

THE COURT: As I understand the law, I could not give him a suspended sentence--as I understand the law. Have you been reading the papers about how they're riding herd on the judges because they give suspended sentences?

MR. MURRAY: Your Honor, I think that is one of the reasons for the appeal. I must say that I disagree with the press coverage which has been given.

THE COURT: I don't mind the criticism, but I would never give a suspended sentence when a fellow's been given a deferred sentence and sentenced on a felony. I would never give a suspended sentence.

Section 789A.1(2) states that "at time of or after sentencing, the court may suspend the sentence and place the defendant on probation upon such terms and conditions as it may require." However before suspending sentence, § 793A.1 requires the court to determine if it "will provide maximum opportunity for the rehabilitation of the defendant and protection of the community from further offenses by the defendant and others." In the instant case defendant argues the trial court's mistaken belief as to § 798A.1(2) resulted in an abuse of discretion because it deprived the trial court of the ability to consider available alternatives to incarceration.

The foregoing conversation occurred at the hearing on defendant's request for court appointed counsel and transcripts at public expense. At the sentencing hearing, the trial court amply supported its decision for imposing the maximum sentence in its dialogue with defense counsel. McCarthy had already been given a deferred sentence and a suspended sentence on previous charges. He also had several other charges of false uttering and drawing of a check, dismissed. The trial court stated it was one of the worst criminal records it had seen for a long time for a fellow so young. The trial court did not abuse its discretion.

Nor was discretion abused at the subsequent hearing on court appointed counsel and transcript costs at public expense. The trial court's statement that it could not give defendant a suspended sentence was made in response to defense counsel's expectations for a suspended sentence. There is nothing to indicate the trial court thought it was

unable to grant a suspended sentence as a matter of law. Rather, it was in response to this defendant's criminal history and the requirement in § 789A.1 that such a result would provide maximum opportunity for defendant's rehabilitation and the community's protection as well as from further offenses of defendant and others. See State v. Peckenschneider, 236 N.W.2d 344 (Iowa 1975).

Defendant's other complaint is that the trial court abused its discretion because it refused to consider the suspended sentence because of pressure from the press. In light of the trial court's review of defendant's record, we do not interpret these remarks as indicating any abdication or abuse of the court's exercise of discretion in determining the sentence.

**AFFIRMED.**