

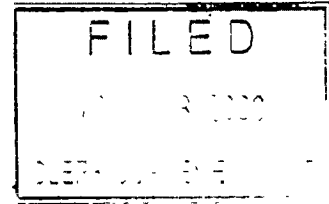
IN THE COURT OF APPEALS OF IOWA

No. 0-535 / 99-1829
Filed November 8, 2000

STATE OF IOWA,
Appellee,

vs.

DEBRA ANN McNEAL,
Appellant.



Appeal from the Iowa District Court for Scott County, Douglas McDonald,
District Associate Judge.

Debra McNeal appeals her sentence imposed for prostitution in violation
of Iowa Code section 725.1 (1999). **AFFIRMED IN PART, VACATED IN PART,
AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, William E. Davis, County Attorney, and Alan R. Havercamp and Marc
Gellerman, Assistant County Attorneys, for appellee.

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

VOGEL, P.J.

Debra McNeal appeals her sentence imposed for prostitution, an aggravated misdemeanor, in violation of Iowa Code section 725.1 (1999). We find the record fails to show the trial court exercised its discretion regarding possible suspension of the fine. Therefore, we affirm in part, vacate in part, and remand for limited resentencing.

Background facts. McNeal entered a written plea of guilty to prostitution on October 4, 1999. On November 9, 1999, she was sentenced to be incarcerated for two years and pay a \$500 fine. McNeal now appeals the fine imposed on her conviction.

Scope of review. Our scope of review for defects in a sentencing procedure or for a sentence outside statutory limits is for corrections of errors at law. *State v. Sandifer*, 570 N.W.2d 256, 257 (Iowa App. 1997). We will not disturb a sentence on appeal unless the defendant shows an abuse of the trial court's discretion or a defect in the sentencing procedure. *Id.* Sentencing decisions of the trial court are cloaked with a strong presumption in their favor. *State v. Ayers*, 590 N.W.2d 25, 29 (Iowa 1999). When a sentencing court has discretion, it must exercise that discretion. *State v. Finchum*, 364 N.W.2d 222, 225-26 (Iowa 1985). Failure to exercise that discretion calls for a vacation of the sentence and a remand for resentencing. *Ayers*, 590 N.W.2d at 27.

Fine. For an aggravated misdemeanor, Iowa Code section 903.1(2), provides, "There shall be a fine of at least five hundred dollars, but not to exceed five thousand dollars." McNeal concedes the legislature has mandated the imposition of the fine. *State v. Grey*, 514 N.W.2d 78, 79 (Iowa 1994). McNeal

argues, however, the trial court, after imposing the fine, failed to exercise its discretion because it did not consider *suspending* the fine under Iowa Code section 907.3. Establishing a minimum fine does not remove the court's authority to suspend the fine. *Grey*, 514 N.W.2d at 79. In asserting this argument, McNeal compares the aggravated misdemeanor section under Iowa Code section 903.1(2) to the simple and serious misdemeanor sections under 903.1(1), which provide those fines "shall not be suspended by the court." It is clear the legislature, under the aggravated misdemeanor section, has left the court with the option of suspending the fine imposed. See *Ayers*, 590 N.W.2d at 31.

The issue then becomes whether the district court must state on the record its reason for not suspending an imposed, mandatory fine. During McNeal's sentencing, she informed the court that she had successfully completed a drug rehabilitation program and was currently participating in an aftercare recovery plan to remain drug free. The court then sentenced her, stating:

Well, that's great, but it's after five prior convictions for prostitution and you've been to prison before on the same charge. It's a little late for that. It's nice that you're doing something to help yourself, but your record is not good.

So, pursuant to your plea of guilty to the charge of Prostitution, a violation of Section 725.1, I will sentence you to pay the **minimum required** fine of \$500.00 and sentence you to serve a term of not to exceed five years with the Iowa Department of Corrections. Five years? Two years, I'm sorry. It's an aggravated misdemeanor. . . (emphasis added)

The district court must demonstrate its exercise of discretion by stating upon the record the reasons for the particular sentence imposed but is generally not required to give its reasons for rejecting particular sentencing options. *State*

v. Thomas, 547 N.W.2d 223, 225 (Iowa 1996). The supreme court in *Ayers* relied on a record which clearly showed the trial court was under the mistaken belief that it had no discretion in the sentencing of the defendant. *Ayers*, 590 N.W.2d at 27. The record indicated the trial court's language as follows:

The Court cannot grant a deferred judgment. It cannot defer sentencing. It cannot suspend the sentence. It must impose that sentence. It has no choice or discretion whatsoever in the matter.

Id. It stated repeatedly throughout the sentencing that it lacked any discretion in the sentencing of that defendant. *Id.*; see also *State v. Washington*, 356 N.W.2d 192, 197 (Iowa 1984). The supreme court, therefore, vacated the sentence and remanded for resentencing. *Ayers*, 590 N.W.2d at 33.

The record before us is not so clear. There is no direct language to plainly indicate the trial court believed it had no discretion in suspending the sentence imposed, except for the phrase "minimum required" used in the imposition of the fine. McNeal argues the trial court's reference to the fine as the "minimum required" indicates the sentencing judge felt he had no discretion to suspend the fine. The State contends the trial court did exercise its discretion, ordering the fine based on McNeal's five prior convictions for the same offense and that her recent change in lifestyle, while to her benefit, did not sway the court from an appropriate sentence. While there is an indication in the record as to why the term of incarceration was imposed, there is no explanation as to the imposition of the fine other than describing the fine as the "minimum required" and nothing to indicate the court's consideration of suspending the fine.

In *State v. Lee*, 561 N.W.2d 353, 354 (Iowa 1997), the trial court referred to two fines as "statutory required mandated fine" and "a minimum statutory fine

that must be imposed by the Court.” On appeal, Lee argued the court erroneously believed it had no discretion to *suspend* the fines and failed to exercise its discretion in *imposing* the fines. *Lee*, 561 N.W.2d at 354. Although the record was silent as to whether the court considered suspending the fines, our supreme court remanded for resentencing, holding:

The sentencing court’s language suggests it erroneously believed it had to impose a “statutory required mandated fine” of at least \$1000, and it did not exercise any discretion in imposing it. Where a court fails to exercise the discretion granted it by law because it erroneously believes it has no discretion, a remand for resentencing is required.

Id. We find the record before us is similar to *Lee* and unclear as to whether the trial court exercised its discretion in considering suspending the fine imposed. *Id.*; see also *State v. Spivie*, 581 N.W.2d 205, 210 (Iowa App. 1998) (holding trial court believed fine was mandatory so failed to use discretion in sentencing). We, therefore, remand for resentencing. The resentencing is limited to the fine imposed as McNeal has not challenged the imposition of her term of incarceration. *Sandifer*, 570 N.W.2d at 258.

We affirm the judgment and sentence imposed as to the term of incarceration. We vacate the fine portion of the sentence and remand for resentencing consistent with this decision.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Hecht, J., concurs; Miller, J., dissents.

MILLER, J. (dissents)

I respectfully dissent. The majority recognizes the principles that sentencing decisions of the trial court are cloaked with a strong presumption in their favor and an abuse of sentencing discretion will not be found unless the defendant shows that such discretion was abused, and that a failure to exercise available discretion constitutes an abuse of discretion. The majority also recognizes the principle that although the sentencing court must demonstrate the exercise of discretion by stating upon the record the reasons for the particular sentence *imposed*, it is not required to give its reasons for rejecting particular sentencing options. However, I do not believe that the majority's decision in this case squares with those principles.

This case involves an important distinction between *imposing* a sentence and *suspending* that sentence or a part of it. The majority states that while the record indicates why the term of incarceration was imposed, the only explanation as to why a fine was imposed is the sentencing judge's description of the fine as a "minimum required" fine. The majority goes on to find that the record is unclear as to whether the trial court exercised its discretion in ordering the defendant to pay the fine, and concludes that the fine must be vacated and the case remanded for resentencing in part. For several somewhat related but separate reasons I disagree with the majority's analysis and disposition.

First, I do not read the sentencing judge's explanation of reasons for the sentence in the same way the majority does. The majority reads all of the statement of reasons, except the reference to the fine as "the minimum required fine," as applying solely to the prison sentence. Based on her prior record and

unsuccessful attempts at rehabilitation, the defendant apparently recognized that imprisonment and a fine was a likely sentence. Just before the sentencing judge imposed sentence the defendant stated through counsel that "she would also ask for minimum time and she is asking for community service to pay the fine." In shortly thereafter rejecting that request and stating reasons for the sentence he was about to impose, the sentencing judge noted that the defendant had five prior convictions for prostitution and had been to prison before on the same charge. He then proceeded to impose sentence. In imposing sentence the judge imposed a fine first and a prison sentence next, all in the same sentence. Because the fine and prison sentence were imposed in that order, in the same sentence, and immediately after the judge's reference to the defendant's prior convictions for prostitution and imprisonment for prostitution, I read the judge's statement of reasons for the sentence as applying to both the fine and prison term, and not to the prison term alone.

Second, even if it is possible to read the judge's statement of reasons for the sentence as applying only to the prison term, we should not do so where, as here, it is also reasonable to read it as also applying to the fine. This approach is mandated under the principles noted above. Where, as here, the statement of reasons can as reasonably be read as applying to both the prison sentence and fine rather than being read as applying to the prison sentence alone, the defendant has not met her burden to show an abuse of discretion.

Third, having demonstrated the exercise of discretion by stating reasons for the sentence he chose to *impose*, the sentencing judge was not required to

give reasons for rejecting particular sentencing options, such as to *suspend* that portion of the sentence represented by the fine.

Fourth, when the judge's reference to "the minimum required fine" is correctly viewed in context as noted above, it is legally correct and does not demonstrate a failure to exercise sentencing discretion. The sentence that was imposed implicitly rejected deferral of judgment and constituted a "conviction." Prostitution is an aggravated misdemeanor and sentencing was pursuant to Iowa Code section 903.1(2). It provides, in relevant part, "When a person is convicted of an aggravated misdemeanor . . . [t]here shall be a fine of at least five hundred dollars" The defendant was convicted. The judge had decided to impose a fine and prison sentence, and had demonstrated the exercise of discretion by stating reasons for the sentence he chose to *impose*. Because the judge had decided to *impose* a fine there was, as he stated, a "minimum required fine of \$500.00."

Finally, both practical and policy considerations suggest we should adhere to the principles noted above and should not lightly find a failure to exercise sentencing discretion. Experienced trial judges, such as the one in this case, have no doubt conducted sentencing in hundreds and probably thousands of indictable misdemeanor cases, such as this one. They are well aware of the sentencing statutes and possible sentences that can be imposed. We should not readily find a failure to exercise sentencing discretion on a record that can just as reasonably be seen as demonstrating an exercise of that discretion. When we do so we encourage meritless appeals at significant, unwarranted cost. We also do not adhere to the principles cited in the majority opinion and noted above.

In reviewing claims of failure to exercise sentencing discretion, there are several things we should not do if we are in fact to apply the principles we espouse. We should not construe a sentencing court's correct statement that it has no discretion in sentencing on one of multiple charges, as stating a belief that it has no discretion in sentencing on another. We should not construe a sentencing court's correct statement that it must *impose* a particular sanction, as stating or demonstrating a belief that it has no discretion to *suspend* that sanction. We should not construe a sentencing court's correct statement that it must impose a particular sanction, such as incarceration, as stating or demonstrating a belief that it must impose another sanction, such as a fine. We should not construe a sentencing court's correct statement that it must *impose* a term of incarceration, as stating or demonstrating a belief that it has no discretion to *waive* a portion or all of any mandatory minimum term when waiver is allowed by statute. We should not, as I believe we do in this case, construe a sentencing court's statement of reasons for a sentence as applying only to part of that sentence, here the term of incarceration, when the statement can as reasonably be read as applying to other parts as well, here the fine. We should not, as I believe we do in this case, construe a sentencing court's correct statement that a fine that it has chosen to *impose* and stated reasons for *imposing* is a "minimum required fine," as stating or demonstrating a belief that it has no discretion to *suspend* that fine. When we do any of these things we do one or more of the following: (1) indulge in a presumption against the sentencing decision, (2) place the burden on the State to demonstrate that sentencing discretion was not

abused, or (3) require the sentencing court to give reasons for rejecting particular sentencing options.

In summary, if we appropriately place the burden on the defendant to show a failure to exercise sentencing discretion, if we grant the trial court's sentencing decision the strong presumption in its favor to which it is entitled, and if we do not require the sentencing court to give reasons for rejecting particular sentencing options, the record in this case must be read as showing that although the sentencing judge did not give reasons for rejecting a particular sentencing option, *suspending* the fine, he did exercise discretion and demonstrated that he did so by stating upon the record the reasons for the particular sentence he chose to *impose*.

I would affirm the district court's sentence in its entirety.