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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-527 / 94-0227

STATE OF IOWA,

Plaintiff-Appellee,

vs.

TIMOTHY PAUL RICKERT,

Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Defendant appeals from his conviction and sentence on two counts of second-degree sexual abuse in violation of Iowa Code section 709.3(2) (1993). **AFFIRMED.**

Donna Lesyshen of Tyler & Lesyshen, Waterloo, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, and Thomas J. Ferguson, County Attorney, for appellee.

Heard by Hayden, P.J., and Habhab and Huitink, JJ.

HABHAB, J.

On April 29, 1993, a petition was filed in the juvenile court alleging the defendant, Timothy Rickert, had committed juvenile acts. The associate district court judge ordered Rickert to be tried as an adult. On July 27, 1993, Rickert was charged by trial information with three counts of second-degree sexual abuse in violation of Iowa Code section 709.3(2) (1993). The information alleged Rickert had committed sexual abuse on a number of adolescent children. Although Rickert was only charged with three counts, the police reports acknowledged there were as many as ten or eleven incidents of sexual abuse.

Prior to the charges, Rickert had begun counseling at the Stillpoint Program at the Covenant Medical Center in Waterloo. The therapists described Rickert as socially inept, an introvert and an inadequate individual experiencing considerable stress. Following the waiver hearing, Rickert began counseling with a consultant for the department of corrections. The counselor found Rickert to be immature and very depressed.

Counsel for Rickert filed a notice of intent to invoke section 232.8(3) regarding deferred judgments for juveniles. The State filed a resistance. On January 7, 1994, Rickert pleaded guilty to two counts of second-degree sexual abuse. The district court sentenced him to be committed to the custody of the Director of the State Department of Corrections for a term not exceeding

twenty-five years on each count, the sentences to run concurrently. The sentencing court also recommended that Rickert be placed at Eldora until he reaches the age of eighteen, with recommended placement in the sex offenders program at Mount Pleasant. Rickert appeals.

Rickert argues the sentencing court abused its discretion in failing to grant relief under section 232.8(3). Rickert argues that based on his psychological profile, it would be very harmful for him to be incarcerated without therapy. The State disagrees, arguing that due to the nature of his crimes and the ages of his victims, it would not be in society's best interest for Rickert to be released.

We review for an abuse of discretion. In order to show an abuse of discretion, one generally must show that the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting Weeks v. Burnor, 326 A.2d 138, 140 (Vt. 1974)). "A sentence will be disturbed by a reviewing court only upon a showing that the trial court abused its discretion." State v. Garrow, 480 N.W.2d 256, 259 (Iowa 1992); State v. Neary, 470 N.W.2d 27, 29 (Iowa 1991). No abuse of a sentencing court's discretion will be found unless it is shown discretion was exercised on grounds or for reasons untenable or to an extent which is clearly unreasonable. Id.

I.

Rickert contends the district court abused its discretion by failing to apply section 232.8(3), and grant the appellant an alternative sentence other than commitment to the custody of the Director of the State Department of Corrections. More specifically, defendant contends the sentencing court abused its discretion by not granting him a deferred judgment under section 232.8(3) or a suspended sentence under the applicable state statutes. As it relates to section 232.8(3) which provides in pertinent part:

> If the child pleads guilty or is found guilty of a public offense in another court of this state that court may, with the consent of the child, defer judgment and without regard to restrictions placed upon deferred judgments for adults, place the child on probation for a period not less than one year upon such conditions as it may require. Upon fulfillment of the conditions of probation the child shall be discharged without entry of judgment.

The trial court had before it a number of recommendations relating to sentencing options. It appears from the several comments made by the court during the sentencing process that those recommendations were given careful consideration.

It is clear the trial court has the authority under the aforementioned section to enter a deferred judgment as to a juvenile, even though he or she has been convicted in an adult court. State v. Greiman, 344 N.W.2d 249 (Iowa 1984). While the court may defer judgment under that

section, it is not required to do so. Id. The trial court did consider that section as a sentencing option.

In sentencing Rickert, the sentencing court explicitly considered the option of a deferred judgment and decided it would be inappropriate in this case. The judge stated:

> The very purpose of a deferred judgment is to wipe the slate clean; but given an individual who is a chronic sufferer of an affliction such as one who molests children, perhaps that would not be the best thing to have happen. To allow the records to be sealed and to allow Mr. Rickert to go forward after two to five years of probation in the event of a community-based corrections placement and in the event of a recidivist act, other children would suffer the same harm that these kids that we're talking about this afternoon have suffered.

Further, the judge provided strong reasoning for imposing the sentence he chose to impose. The judge stated, in part:

> [E]ven if a community-based corrections placement was possible, and I express some doubt again as to whether that's possible, but even if it were possible, I would choose not to take advantage of it. There are two victims that have been pled to and a third in Count II which will be dismissed by agreement of counsel, as also it has been agreed that that may be taken into account. If one looks at the Roberts report, there are as many as ten or eleven victims and conceivably as many as seventy different incidents that we're talking about; and, as Ms. Roberts puts it, there may be reason to believe that that might be an understatement.
>
> Given the types of victimizations of the children concerned, given the ages of the children concerned, and given the need to protect the public, and given also that Mr. Rickert can receive the same services and treatment alternatives at the Mount Pleasant sex offender treatment program as he could in community-based corrections, and given that in view of Mr. Rickert's age, he in all probability will probably be detained at the Oakdale facility until he becomes 18 years of age and conceivably may even

> be placed at the Eldora campus until he becomes age 18, the treatment options are available.
>
> All other things being equal, as I said before, I choose to err, if at all, on the side of the protection of child victims.

Rickert next argues the court erred in not granting a suspended sentence and placing him on probation. In this regard, Rickert does not have a constitutional right to probation; the power to grant probation is conferred by statute and is not an inherent power of the judiciary. State v. Wright, 309 N.W.2d 891, 894 (Iowa 1981). The granting of probation is a matter of the sentencing court's broad discretion subject only to the statutory provision that the grant shall promote both the rehabilitation of the defendant and the protection of the community. State v. Ramirez, 400 N.W.2d 586, 590 (Iowa 1987); State v. Darrin, 325 N.W.2d 110, 112 (Iowa 1982); State v. Killpack, 276 N.W.2d 368, 373 (Iowa 1979).

The defendant's final argument is that the court erred in not considering a community-based correction as an available option but the record reveals otherwise. The court did state "even if a community-based corrections placement was possible . . . I would choose not to take advantage of it." With these statements by the court we decline the invitation to determine whether section 232.8(3) makes available placement in a community-based correction.

II.

The district court had good reason to impose the sentence it did. We find no abuse of discretion.

AFFIRMED.