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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed February 24, 1981
vs.) 0-410
JACKIE EUGENE MORROW,) 64641
Defendant-Appellant,)

Appeal from Clinton District Court - A. J. Van Zee, Magistrate.

Defendant appeals sentence imposed for conviction of operating a motor vehicle while intoxicated in violation of section 321.281, The Code 1979. - AFFIRMED.

Thomas J. Yeggy, Davenport, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Thomas N. Martin, Assistant Attorney General of Iowa, for plaintiff-appellee.

Submitted by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

Defendant appeals the sentence imposed for conviction of operating a motor vehicle while intoxicated in violation of section 321.281, The Code 1979. We affirm.

Defendant was arrested on January 9, 1980, for violation of section 321.281. On January 24, 1980, defendant plead guilty to the charge and filed an application for a deferred sentence. Since defendant had not been convicted of an O.M.V.U.I. offense for at least six years, the conviction was his first offense and therefore a serious misdemeanor. See § 321.281, The Code 1979. The application contained a request that the court order a pre-sentence investigation. On February 7, 1980, the trial court denied defendant's application, including the request for a pre-sentence investigation, and sentenced him to pay a $200 fine, to serve two days in jail, and suspended his driving privileges for an indefinite period. The trial court suspended the jail term.

A reviewing court will not disturb the sentence rendered by a trial court when the sentence is within the statutory maximum and no abuse of discretion is shown. State v. Moreland, 252 N.W.2d 465, 466 (Iowa 1977); State v. Kendall, 167 N.W.2d 909, 911 (Iowa 1969) (quoting State v. Cooper, 161 N.W.2d 728, 732 (Iowa 1968)). Defendant's sentence was within statutory limits. See §§ 321.281, 903.1(2), The Code 1979. Therefore we disturb defendant's sentence only if he can show that the trial court abused its discretion. For a trial court to abuse its sentencing discretion, "the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." State v. Noonan, 246 N.W.2d 236, 237 (Iowa 1976) (quoting State v. Warner, 299 N.W.2d 776, 783 (Iowa 1975) (quoting Wendel v. Swanberg, 384 Mich. 468, 475-76, 185 N.W.2d 348, 351 (1971))).

I. Defendant points out that a sentencing court has a duty to ascertain any and all facts, whether in or out of the record, that would assist in the exercise of its sentencing discretion. State v. Thompson, 275 N.W.2d 370, 371 (Iowa 1979); State v. Kendall, 167 N.W.2d 909, 911 (Iowa 1969). Defendant contends that the court below failed in this duty by refusing to order a pre-sentence investigation. We disagree.

Section 901.2, The Code 1979, provides that a sentencing court "may order a pre-sentence investigation when the offense is an aggravated or serious misdemeanor." Since defendant's offense was a serious misdemeanor, the trial court had the discretion

to decide not to order a pre-sentence investigation.

In State v. Patterson, 161 N.W.2d 736, 737 (Iowa 1968) the Iowa Supreme Court affirmed the defendant's sentence even though the trial court failed to order a pre-sentence investigation. The court stated that while it has recommended pre-sentence investigations where they are discretionary, it has never required them. Patterson, 161 N.W.2d at 737. In the instant case the decision whether to order a pre-sentence investigation was within the sentencing court's discretion. See § 901.2, The Code 1979. As indicated in subdivision II below, the trial court had before it ample information based upon which it reasonably could render a just sentence. In light of section 901.2 and Patterson we conclude that defendant failed to demonstrate that the sentencing court abused its discretion in failing to order a pre-sentence investigation.

II. Defendant points out that a court has a duty to weigh and consider all pertinent matters in determining the proper sentencing to be imposed, including the nature of the offense, the attending circumstances, defendant's age, his character and propensities, and his chances of reform. Kendall, 167 N.W.2d at 911; State v. Cooper, 161 N.W.2d 728, 732 (Iowa 1968). Defendant contends that the trial court impermissibly based its sentencing decision on only one factor, the fact that defendant is in the repair business. There is no evidence at all that the trial court based its decision solely on this factor. Moreover, there was sufficient evidence enabling the trial court to make a just sentencing decision. When the trial court made the sentencing decision, it had before it information concerning the offense and the surrounding circumstances, defentant's age, driving history, criminal record, and employment. The court gave defendant an opportunity to provide it with information relevant to making the sentencing decision, and defendant took advantage of the opportuntity. We accordingly conclude that defendant has failed to establish that the trial court abused its decretion in sentencing defendant.

AFFIRMED.