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IN THE COURT OF APPEALS OF IOWA

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Filed December 26, 1984

4-428
84-112

STATE OF IOWA,

Plaintiff-Appellee,

vs.

RUSSELL W. SHIELD,

Respondent-Appellant.

Appeal from the Iowa District Court for Scott County-C. H. Pelton, Judge.

Defendant appeals from the sentence imposed on his conviction of carrying a concealed weapon in violation of Iowa Code 724.4 (1981). Remand to trial court for consideration of release under §356.26. SENTENCE MODIFIED AND CASE REMANDED TO TRIAL COURT.

Douglas E. Johnston, Muscatine, for defendant-appellant.

Thomas J. Miller, Attorney General and Virginia Barchman, Assistant County Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson and Sackett, JJ.

SACKETT, J.

Defendant pled guilty to a charge of carrying a concealed weapon in violation of section 724.4 of the Code of Iowa (1981). Carrying a concealed weapon is an aggravated misdemeanor punishable by imprisonment not to exceed two years or a $5,000 fine. The court sentenced defendant to a term of 120 days in jail, ninety days of which were originally suspended with two years probation and a $500 fine.

I.

The defendant contends the trial court abused its discretion in sentencing him.

The trial court and we on review should weigh and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of his reform. The courts owe a duty to the public as much as to the defendant in determining a proper sentence. The punishment should fit the crime and the individual. State v. Hilderbrand, 280 N.W.2d 393, 396 (Iowa 1979).

A presentence investigation and report was ordered by the court upon defendant's guilty plea. The report indicated defendant was a 28 year old male. It showed defendant to have had traffic related violations and a charge of Possession of Marijuana for which defendant received a deferred sentence and successfully completed probation. Defendant was employed and had no job related disciplinary problems. The report recommended a fine and assessment of court costs against defendant.

The sentence given the defendant is within the statutory limits. A sentence imposed within statutory limits will be set aside only for 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).

Defendant contends the court should not have ordered a jail term where the presentence investigation report recommended a fine. It is not an abuse of discretion for the trial court not to follow the recommendation of the presentence report. See State v. Beyer, 258 N.W.2d 353, 359 (Iowa 1977); State v. Carncross, 205 N.W.2d 698, 698-699 (Iowa 1973).

Defendant next contends that the trial court based his sentence upon a sentencing policy and limited its sentencing consideration to one factor, the fact that a weapon was involved. It is well established that a trial court who applies a fixed sentencing policy abuses its discretion. State v. Hildebrand, 280 N.W.2d 393, 397 (Iowa 1979). After recounting the facts with reference to defendant's having a loaded pistol in a bar, the court determined that because a weapon was involved and defendant nad had problems following the rules before, it was appropriate to impose a more severe sanction than defendant had in the past. Defendant contends this indicates the court has a fixed sentencing policy. We disagree. The record does not establish a finding that the trial court had or was establishing a fixed policy on every case involving a gun. The record indicates these facts were considered in defendant's individual case. The trial court did not abuse its discretion.

II.

After the sentence was determined the defendant asked for permission to leave jail during the hours of his employment. The trial court then increased the term of confinement to 60 days and granted the work release.

Defendant claims this was an abuse of discretion in increasing or doubling the confinement period, contending that the defendant was punished with twice as much confinement in order that he not lose his employment. The state contends the trial court did not abuse its discretion because the court's decision as to the amount of time the defendant was to spend in jail was based upon the assumption that the whole sentence would be spent in jail and if defendant were absent from

jail for a significant period of time and was physically present in jail for a shorter period, then the chances were not good that the defendant would reverse his life pattern. We find no law on this issue.

§356.26 provides:

> Leaving jail for certain purposes. The district court may grant by appropriate order to any person sentenced to a county jail the privilege of leaving the jail at necessary and reasonable hours for any of the following purposes:
>
> 1. Seeking employment.
> 2. Working at his employment.
> 3. Conducting his own business or other self-employed occupation, including housekeeping and attending to family needs.
> 4. Attendance at an educational institution.
> 5. Medical treatment.
>
> All released prisoners shall remain, while absent from the jail, in the legal custody of the sheriff, and shall be subject, at any time, to being taken into custody and returned to the jail.

§356.27 provides:

> Privilege expressly granted. Unless such privilege is expressly granted by the court, the prisoner is sentenced to ordinary confinement. Any prisoner may petition the court for such privilege at the time of sentencing or thereafter, and the court in its discretion may review the petition and make appropriate orders. The court may withdraw the privilege at any time by order entered with or without notice or hearing.

"Sentencing is an independent function that follows the adjudication of guilt; it is the sole duty of the judiciary, subject to the statutory prescriptions of the legislature." State v. Iowa District Court for Shelby County, 308 N.W.2d 27, 30 (Iowa 1981).

Under Iowa law the district court may issue an order granting permission for a sentenced prisoner regularly to leave the jail to work or attend an educational institution. This provision is apparently intended to have a rehabilitative effect. Because the statute places no substantive limitations on the discretion of the trial court in determining who may participate in the release programs, the state has not created a constitutionally protected liberty interest. See Johnson v. Stark, 717

F2d 1550, 1551 (1983); Olim v. Wakenekona, ___ U.S. ___, 103 St. Ct. 1741, 1747, 75 LEd2d 813 (1983); Hewitt v. Helms, ___ U.S. ___, 103 S. Ct. 864, 871, 74 L.Ed2d 675 (1983).

In State v. Remmers, 259 N.W.2d 779, 783 (Iowa 1977) the Iowa court found that the sentencing judge relied on an impermissible factor in pronouncing sentence when the length of the sentence resulted in an effort by the trial court to control the amount of time the defendant would actually serve. Remmers is distinguishable because the sentence there was one wherein the parole board was granted exclusive power to determine the amount of time actually served, and the court in their determination held - at p. 785:

> "Under the sentencing statutes applicable here, the exclusive prerogative to determine defendant's minimum sentence rested in the board of parole by reason of its sole authority to make parole decisions. The judicial sentencing decision is not an appropriate means for attempting to circumvent this principle by basing the length of sentence in part on a desire to lengthen the minimum sentence defendant would serve, the trial court in this case sought to pass judgment on an issue foreclosed to the court and to prevent the proper body from deciding the isssue at the proper time."

In this instance the authority to grant release under §356.26 is granted to the district court. Section 356 deals with jails, the place of confinement, not sentencing. By statute, Iowa sheriffs have been assigned the responsibility for operating the couty jails since the early years of Iowa's statehood. Iowa Code §3103 (1851), 66 Ia. Law Rev. 1071, 1079. §356.26 provides for leaving the jail for employment, educational and medical purposes. Released prisoners remain, while absent from the jail, in the custody of the sheriff and are subject to being taken into custody and returned to jail at anytime. The privilege to leave can be granted at sentencing or anytime thereafter. The legislature has in no way connected the granting of the privilege to the length of the jail sentence. The release can be terminated by the court, or it can be suspended by the sheriff §356.35 Iowa Code; it can be granted after sentencing, Iowa Code 356.27; it can

be granted by a district judge, assistant judge or judicial magistrate. These facts negate its use as a sentencing factor.

We determine the trial court abused its discretion in increasing the jail term before ordering work release. Before considering the work release the trial court sentenced the defendant. We therefore know the sentence the trial court would have ordered had it not been for the requested release. We therefore modify the sentence to conform with the original sentence, namely, defendant is sentenced to a term of 120 days in jail, ninety of which are suspended with a two-year probation and a $500 fine. We remand to the trial court to consider whether defendant's application for work release under §356.26 should be granted. We make no determination as to whether work release should be granted.

SENTENCE MODIFIED AND CASE REMANDED TO TRIAL COURT.

All judges concur except Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I respectfully dissent. I do not believe the trial court abused its discretion in increasing the jail term before ordering work release. Pursuant to section 903.1, it is the court's prerogative to make the initial sentencing determination. In the court's opinion, thirty days of confinement was the proper and necessary punishment based on the defendant's record. As respondent indicated, if the defendant was granted work release he would only be serving a fraction of this sentence actually incarcerated. Increasing the sentence in light of the work release only served to carry out the intentions of the original sentencing determination—that the defendant remain in jail for a specified amount of time. This is not improper.

I believe the majority's determination unnecessarily restricts the trial court's ability to tailor a sentence to a specific situation. This is a practice that should be encouraged rather than discouraged. The court made a permissible decision entirely within its statutory authority. It was a decision that cannot be characterized as unreasonable. Accordingly, I would affirm the sentencing determination.