

FILED

NOV 24 1981

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA

)

Plaintiff-Appellee,

)

Filed November 24, 1981

vs.

)

1-315

66258

PAUL RAY HULSING,

)

Defendant-Appellant.

)

Appeal from Black Hawk District Court, Dennis D. Damsgaard, Judge.

Defendant appeals from resentencing on a conviction of second-degree burglary in violation of section 713.3, The Code 1979. We affirm.

W. H. Gilliam of Rapp & Gilliam, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General, and Richard L. Cleland, Assistant Attorney General, for plaintiff-appellee.

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

PER CURIAM

Defendant appeals from resentencing on a conviction of second-degree burglary in violation of section 713.3, The Code 1979. We affirm.

On October 27, 1978, the court entered judgment on a jury verdict of guilty and sentenced defendant to prison for a term not to exceed ten years. On October 21, 1980, this court affirmed the conviction but remanded the case for resentencing because the trial court failed to state on the record the reasons for selecting the sentence imposed.

The resentencing hearing was held January 16, 1981. The court denied probation and imposed a sentence of not more than ten years pursuant to section 902.9, The Code 1979.

Defendant, Paul Ray Hulsing, appeals the sentence, claiming the trial court abused its sentencing discretion. The defendant contends the court abused its discretion by utilizing the presentence investigation report prepared for the defendant's initial sentencing and by the court's reference to the revocation of defendant's work release privileges while he was incarcerated at the Black Hawk county jail in 1977, which is argued as not being contained in the record. The defendant also asserts the Code of Judicial Conduct, Canon 3(c)(1)(a) dictates the judge be disqualified from imposing sentence in this case because of his extra-record knowledge concerning the defendant. We disagree with all of defendant's contentions.

We strictly adhere to the principle a reviewing court should 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). Defendant's sentence is not questioned as being outside the statutory limits. Therefore, we consider only whether the trial court abused its discretion. For a trial court to abuse its sentencing discretion, "the results 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 passion or bias." State v. Noonan, 246 N.W.2d 236, 237 (Iowa 1976).

We fail to see how the court below can be charged with abusing its sentencing discretion. Initially, we note the fact that defendant's work release privilege was revoked is contained in the presentence investigation report, despite defendant's contentions to the contrary. The particular reason for the revocation of the defendant's privilege was not contained in the presentence investigation report. The judge,

however, corroborated his personal suspicion the revocation was due to defendant's theft of some newspapers from the courthouse by questioning the defendant and giving him the opportunity to rebut the court's belief. We are also of the opinion the court was well within permissible limits in eliciting that information from defendant. See, e.g., United States v. Read, 534 F.2d 858, 859 (9th cir. 1976). In State v. Kendall, 167 N.W.2d 909, 911 (Iowa 1969), the court stated, "It was the duty of the trial court to ascertain any and all facts that would assist in the proper exercise of its discretion in fixing defendant's sentence, whether in or out of the record." Clearly, the trial court did not abuse its sentencing discretion.

We are also of the opinion the portion of Canon 3, Code of Judicial Conduct, quoted by defendant, is not applicable, by its own terms, to the matter under advisement. The trial court is affirmed.

AFFIRMED.