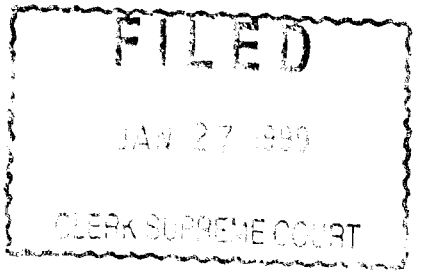
IN THE COURT OF APPEALS OF IOWA

No. 8-354 / 97-1490
Filed January 27, 1999



STATE OF IOWA,
Appellee,

vs.

BERNARD BABE,
Appellant.

Appeal from the Iowa District Court for Polk County, Carol S. Egly, Judge.

On appeal from his conviction for indecent contact with a child, Bernard Babe argues the district court considered improper factors when sentencing him. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and Frank Severino, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Vogel, JJ.

HUITINK, J.

Bernard Babe appeals the sentence imposed on his conviction for indecent contact with a child. He claims the district court considered improper factors in entering the sentence. We affirm on appeal.

On August 13, 1996, Babe was at the Iowa State Fair. A thirteen-year-old child, C.H., reported that while in a men's restroom, Babe grabbed the victim's testicles over his clothing. C.H. stated he pushed Babe away and ran from the restroom. Babe admitted encountering the victim in the men's restroom, but stated C.H. accidentally ran into his hand as he left the restroom.

Babe was charged with indecent contact with a child, in violation of Iowa Code section 709.12. Babe entered an *Alford* plea. He was given a suspended sentence and placed on probation. The district court ordered him to complete sex offender treatment. Babe met with Dr. T. Nicholas Tormey, a licensed psychotherapist. Tormey reported Babe seemed unwilling and unable to make much progress in treatment. The district court then ordered Babe to have a mental health evaluation at Eyerley-Ball Community Mental Health Center. He was uncooperative with the evaluation.

Babe was allowed to withdraw his *Alford* plea, and the case was set for a bench trial. The district court found Babe guilty. He was sentenced to a term of imprisonment not to exceed two years. The court rejected Babe's request for

probation, based on his failure to participate in sex offender treatment or a mental health evaluation. Babe now appeals his sentence.

When a sentence falls within statutory limits it will only be set aside for an abuse of discretion. *State v. Mai,* 572 N.W.2d 168, 170 (Iowa App. 1997). An abuse of discretion is found only when the sentencing court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Privitt,* 572 N.W.2d 484, 486 (Iowa 1997).

Babe contends the district court abused its discretion in entering his sentence because the court considered improper factors. He states he did not participate in sex offender treatment because he was innocent, and the treatment was too expensive. Babe asserts he cooperated with the mental health evaluation, except for questions concerning the sex offense. He points out there was only hearsay evidence he had not cooperated with the mental health evaluation.

Sentencing procedures are governed by different evidentiary rules than the trial itself. *State v. Hansen,* 344 N.W.2d 725, 731 (Iowa App. 1983). The court, within its discretion, may consider hearsay testimony. *Id.* We find the sentencing court could properly consider evidence Babe had not cooperated with the mental health evaluation.

We conclude the district court did not abuse its discretion in sentencing Babe to a term of imprisonment. The court considered the presentence investigation, a letter from Tormey, and statements from counsel. Babe had failed to participate in

sex offender treatment or the mental health evaluation. There was ample evidence for the court to find probation was not appropriate in this case.

In the alternative, Babe claims he received ineffective assistance due to defense counsel's failure to call him as a witness, or call anyone from Eyerley-Ball as a witness. Babe asserts he could have presented evidence to show he was cooperative for most questions during the mental health evaluation.

Our review of an allegation of ineffective assistance of counsel is de novo. *Cox v. State,* 554 N.W.2d 712, 714 (Iowa App. 1996). To establish a claim of ineffective assistance of counsel, a defendant must show: (1) the attorney failed to perform an essential duty; and (2) prejudice resulted to the extent it denied defendant a fair trial. *Bettis v. State,* 547 N.W.2d 635, 637 (Iowa App. 1996).

We determine Babe has not shown his sentence would have been different if other evidence had been presented. It is clear Babe failed to participate in sex offender treatment and would not answer questions concerning the sexual offense at the mental health evaluation. Babe has failed to show he was prejudiced by his attorney's actions.

We affirm the sentence imposed by the district court. Costs of this appeal are assessed to Babe.

AFFIRMED.