

FILED

AUG 29 1985

IN THE COURT OF APPEALS OF IOWA**STATE OF IOWA,**

)

Filed August 29, 1985 CLERK SUPREME COURT

Plaintiff-Appellee,

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vs.

)

5-230
84-1322**BEVERLY JO (IVES) BROOKHISER,**

)

Defendant-Appellant.

)

Appeal from the Iowa District Court for Des Moines County, Harlan Bainter,
Judge.

Defendant appeals from the sentence imposed following her conviction
of conspiracy to deliver a controlled substance, asserting that the district court
failed to state on the record its reasons for selecting the sentence it did. SEN-
TENCE VACATED: REMANDED.

Deborah A. Goins, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Valencia Voyd McCown, Assistant
Attorney General, for plaintiff-appellee.

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

The defendant appeals from her sentence, saying the court erred in not stating its reasons for imposing the sentence. We agree, vacate the sentence, and remand for resentencing.

Defendant Beverly Jo Brookhiser was convicted of conspiracy to deliver a controlled substance, marijuana. The presentence investigation report indicated that defendant is thirty-three years old, that she has four children, that she remarried after the current charges were brought, that she is a licensed nurse but apparently has not worked as such since 1979, and that she is receiving ADC payments. At the sentencing proceeding, defense counsel requested that defendant be given a deferred judgment. He stated that conviction of a drug offense would result in automatic revocation of defendant's nursing license. Counsel for the State resisted the granting of a deferred judgment but not the granting of a suspended sentence and probation. He stated that defendant must be adequately punished, and that an example must be set for others. The district court sentenced defendant to a term of not to exceed five years in prison and then suspended the sentence and placed defendant on probation. The judge stated:

The court has determined the sentence in this matter by taking into consideration all of the facts as they appear in the presentence investigation. The Court has taken into consideration the statements of the prosecution as well as the statements in your behalf by your attorney. The Court has determined, Ms. Ives or Mrs. Brookhiser, that you should be granted probation in connection with this matter. The Court is not going to grant a deferred judgment.

The State concedes that the sentencing judge must state the reason for choosing a particular sentence when discretion is permitted under the Code.

Iowa R. Crim. P. 22(3)(d); State v. Marti, 290 N.W.2d 570, 589 (Iowa 1980). Since the offense charged here was not a forcible felony, as defined by section 702.11 of the Code, the sentencing court had discretion to consider the sentencing alternatives set out at Chapter 907. The court has stated that in such a situation the requirement that reasons for the particular sentence be stated, "is more than directory." State v. Victor, 310 N.W.2d 201, 205 (Iowa 1981). The reason for this requirement is to provide the appellate court with a basis on which to decide whether the trial court abused its discretion. State v. Luedtke, 279 N.W.2d 7, 8 (Iowa 1979). If the judge does not state the reasons adequately, the sentence must be vacated and the case remanded for amplification of the record and resentencing. Id. at 8; State v. Marti, at 589.

It is the State's contention that adequate reasons were presented in the record. The State indicates our case law shows it is enough if it is clear from the trial court's statements what motivated the choice of sentence. State v. Victor, 310 N.W.2d 201, 205 (Iowa 1981). Further, the court can look to the whole record to see if the trial court abused its discretion. See State v. McKeever, 276 N.W.2d 385, 388 (Iowa 1979). The State points to the record to show that there was evidence from the minutes of the county attorney's office that the defendant played an active role in the crime. Although she will lose her nursing license if judgment is not deferred, the State notes she has not practiced nursing for five years.

We agree with the State that if it is clear from the trial court's statements what was in the judge's mind, there is no error. However, in the case cited by the State, the court stated its reason for choosing the particular sentence was the "nature of the offense." State v. Victor, at 205. We have also upheld a sentence where the reasons given for its pronouncement were that the acts of the defendant were "despicable, heinous, revolting." State v. Stanley, 344

N.W.2d 564, 568 (Iowa Ct. App. 1983). However, each of these cases is different from the one before this court because no reason was given at all by the court for picking the particular sentence.

Further, in McKeever, the court was deciding if the trial court had put too much emphasis on the nature of the offense as a factor in choosing the sentence, or whether it properly took into account the specific circumstances of the case. State v. McKeever, at 387. The supreme court stated that the record showed the judge must have seen and considered the other factors present in addition to the one articulated. Id. at 388. There is nothing in the record to show the judge's reason for declining to defer judgment. This is evident by the fact that State picks and chooses various factors available to the judge in guessing which influenced the court.

The only way this court could affirm the sentence would be to hold that if any possible factor appears in the record which might be the reason the judge decided as he did, despite the total lack of an articulated reason, then rule 22(3)(d) has been met. To do so would, in effect, eliminate all meaning of the rule.

We find we must vacate the sentence, and remand for amplification of the record and resentencing.

SENTENCE VACATED: REMANDED.

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

I dissent. The sentence should be affirmed.