IN THE COURT OF APPEALS OF IOWA

No. 2-609 / 92-354

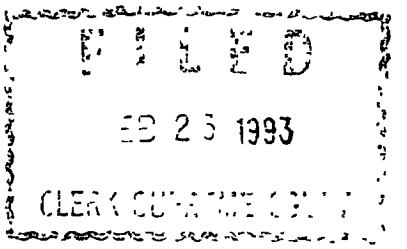
STATE OF IOWA,

Appellee,

vs.

GARY BARING,

Appellant.



Appeal from the Iowa District Court for Polk County, Anthony M. Critelli, Judge.

Defendant pled guilty to the crime of sexual abuse in the third degree in violation of Iowa Code section 709.4(2)(c)(4). He appeals the resulting sentence. **AFFIRMED AND REMANDED FOR RESENTENCING.**

Andrew J. Dunn and Alfredo Parrish of Parrish & Kruidenier, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General; Lynette A.F. Donner, Assistant Attorney General; John Sarcone, County Attorney; and Scott Rosenberg, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Hayden and Habhab, JJ.

OXBERGER C.J.

A trial information was filed against the defendant charging him with three counts of sexual abuse in the third degree in violation of Iowa Code section 709.4(2)(c)(4). A plea agreement was reached between defendant and the State which provided, in exchange for defendant's guilty plea to count II of the trial information, the State would dismiss counts I and III and that charges contained in another criminal case would also be dismissed. The defendant entered his guilty plea to count II before Judge Fenton. The defendant was sentenced by Judge Critelli pursuant to Iowa Code section 709.4(2)(c)(4), 902.3, and 902.9. He was sentenced to a term of no more than ten years. Defendant now appeals.

The defendant asserts the sentencing court abused its discretion when it ordered his imprisonment to a term of no more than ten years. He raises three points on appeal: (1) the sentencing court may have believed it had no discretion when it sentenced defendant because of the mistaken belief the offense was a forcible felony; (2) the court based its sentencing decision solely on one factor, the nature of the offense; and (3) the court relied on unproven and unestablished crimes when it ordered defendant's sentence.

The standard of review here is abuse of discretion for this case involves a court's sentencing discretion. State

v. Stanley, 344 N.W.2d 564, 567 (Iowa App. 1983). A sentencing judgment "will not be disturbed . . . unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest an inherent unfairness and injustice, or conduct which offends the public sense of fair play." State v. Ashley, 462 N.W.2d 279, 281 (Iowa 1990). To demonstrate an abuse of discretion, the challenging party must show the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Ramirez, 400 N.W.2d 586, 588 (Iowa 1987). The requirement of clear showing of abuse of discretion is a difficult standard to meet. State v. Halstead, 362 N.W.2d 504, 506 (Iowa 1985).

The defendant pled guilty to a section 709.4(2)(c)(4) crime. This crime is statutorily designated as a class C felony. It is not a forcible felony. Section 702.11, the section of our Code that defines forcible felony, specifically exempts sexual abuse under section 709.4(2)(c)(4).

The defendant contends that because the court did not fix bond on appeal, it must have felt he pled guilty to a forcible felony. The defendant argues further that if the court proceeded with this mistaken belief, it then followed that the court must have believed that it could not grant probation. We disagree.

It is clear the court did take into consideration the sentencing options available to it. The record reveals that prior to imposing sentence, the defendant offered evidence through Dr. Rypma, a clinical psychologist, as to the appropriateness of granting probation. Further, during the course of the sentencing, the court stated:

> Granting a probation in this case is denied because it is unwarranted in order to protect the public from further criminal activity by the defendant and would unduly lessen the seriousness of the offense.

Immediately after making the aforesaid statement, the court stated:

> No bond on appeal is set. Costs are taxed to the defendant. Defendant is to receive credit for time already served. Count II being disposed of and upon the recommendation of the county attorney, charges in counts I and II [sic] are hereby dismissed. Mr. Baring, I am required by law to advise you of your right--

The court at this juncture was advised by defense counsel that the offense to which his client had pled guilty was bondable and that the defendant could appeal from the resulting judgment. The county attorney acknowledged that it was a bondable offense. The court thereupon fixed bond in the amount of $10,000 cash or surety. Thereafter the defendant was advised of his right to appeal to the Iowa Supreme Court and the method that should be employed to perfect an appeal.

After the defendant acknowledged that he understood his right to appeal and after the court had corrected itself by fixing bond on appeal, the court stated further:

> I would also state for the record in addition to the reasons I have indicated in my formal order and in reviewing the facts of this case, that is the minutes of testimony as well as the presentence investigation, I think it is fair to say these acts took place over a long period of time. That there was numerous sexual activity, that at various times pictures were taken, oral sex, finger digital intercourse, use of marijuana and liquor, to perhaps make this victim more inclined to be involved in this activity. It's not like it was a one-time thing. This is a designed thing over a long period of time and that also went into the court's reasoning in pronouncing this sentence. You're excused. Take a seat over there.

Turning briefly to sentencing options, under Iowa Code section 901.5, a trial court has considerable discretion in choosing among available and authorized sentences, "which of them or which combinations of them, in the discretion of the court, will provide maximum opportunity for the rehabilitation of the defendant, and the protection of the community from further offenses by the defendant and others." Iowa Code § 901.5 (1991).

A trial court has a duty to ascertain any and all facts to assist in the proper exercise of its discretion in fixing defendant's sentence. Pertinent matters include: (1) the nature of the offense; (2) attending circumstances; (3) defendant's age; (4) character; (5) propensity; and (6) chances of his reform. State v. Banks, 213 N.W.2d 483, 487 (Iowa 1973).

The evidence considered by the court in ascertaining the attending circumstances and the defendant's

propensities were contained in the presentence investigation report and the minutes of testimony.

In State v. Messer, 306 N.W.2d 731, 733 (Iowa 1981) and again in State v. Black, 324 N.W.2d 313, 316 (Iowa 1982), the court held minutes of testimony, standing alone, will not provide sufficient proof to be relied on by a sentencing court. Statements contained in minutes are merely allegations of what the State will attempts to prove at trial.

The trial court, at sentencing, said:

> I think its fair to say these acts took place over a long period of time. . . .It is not like it was a one time thing. This is a design thing over a long period of time and that also went into the Court's reasoning in pronouncing this sentence.

In the case at bar the defendant admitted to only one incident of sexual abuse. No evidence was admitted at the plea of guilty or at the sentencing hearing bearing on evidence of other acts of sexual abuse by the defendant.

Accordingly, we remand this case for resentencing consistent with the guidelines set forth in this opinion.

AFFIRMED AND REMANDED FOR RESENTENCING.

Hayden, J., concurs; Habhab, J., dissents.

HABHAB, J. (concurring in part and dissenting in part)

I concur with that part of the majority opinion that concludes the trial court, when sentencing the defendant, did not proceed under the mistaken belief that it could not grant probation. In this respect, the trial court was clearly aware of the various options available to it when imposing sentence.

In addition and to clarify the record, I would also find the court when imposing sentence did consider factors that related to the character and chances of reform of the defendant. When the sentencing proceedings are considered in its entirety, the trial court's decision was not based solely on one factor, that is, the nature of the offense. Thus, I would find the second contention of the defendant to be without merit.

I respectfully dissent, however, to that part of the opinion that remands this matter for resentencing. More specifically, the part of the opinion I find objectionable is the last four paragraphs that begins with the two citations, State v. Messer, 306 N.W.2d 731, 733 (Iowa 1981), and State v. Black, 324 N.W.2d 313, 316 (Iowa 1982).

In my reading of Messer and Black, I find nothing that supports the majority's statement that the minutes of testimony, standing alone, will not provide sufficient proof to be relied on by a sentencing court. See Messer, 306 N.W.2d 731; Black, 324 N.W.2d 313. I believe both Messer and Black stand for that well-recognized principle

that a sentencing court should only consider those facts contained in the minutes of evidence that are admitted to or otherwise established as true. See Messer, 306 N.W.2d 731, 732-33; Black, 324 N.W.2d 313, 315-16. In this respect, sentencing courts should not consider a dismissed charge nor the facts arising from the dismissed charge unless the charge is admitted by the defendant or independently proved.

In Black, the supreme court held the trial court erred in determining the defendant's sentencing by giving consideration to a burglary charge that had been dismissed pursuant to a plea bargain. Black, 324 N.W.2d at 314. The supreme court found that the district court may have improperly based Black's sentence on allegations arising from the unprosecuted burglary charge that were neither admitted by the defendant nor proved independently. Id. The case was remanded to the district court for resentencing. Id.

The same is true in the Messer case. In that case, the defendant was charged with burglary in the second degree. Messer, 306 N.W.2d at 732. The defendant agreed to plead guilty as part of a plea bargain in which the county attorney agreed "prosecution of certain other offenses [was] to be dropped." Id. The other alleged offenses included "several other burglaries." Id. When imposing sentence, the trial court sentenced defendant to imprisonment for a term not to exceed ten years, stating it

was "taking into consideration the fact that there were two other charges that were not prosecuted in this matter as part of a plea bargain." Id. The supreme court remanded for resentencing, instructing the trial court not to take into consideration the other charges unless the facts before the court showed defendant committed those offenses or they are admitted by him. Id. at 733.

I readily admit that minutes of testimony attached to the information do not necessarily provide facts that may be relied upon and considered by a sentencing court. But, our supreme court has approved the use of minutes of testimony to establish a factual basis for the charge to which the defendant pleads guilty. State v. Fluhr, 287 N.W.2d 857, 868 (Iowa 1980). In this respect, when the prosecuting attorney files an information, he must file the minutes of evidence of the witnesses upon whose expected testimony the information is based. By criminal rule, those minutes should constitute a full and fair statement of the witnesses' expected testimony. The minutes are not necessarily what the State will attempt to prove at trial; rather the minutes of testimony are to reveal what the witness is expected to testify to at trial.

Returning to the problem at hand, where portions of the minutes are not necessary to establish a factual basis for the guilty plea, they are yet denied by the defendant, and the sentencing court is not to consider or rely on those portions unless, of course, there are facts before the

court to establish them as true or the defendant admits them to be true.

In summation, Messer and Black make it clear that trial courts can consider those facts contained in the minutes that are admitted or otherwise established as true. Thus, in the case at bar, those minutes of the testimony that relate to count II of the trial information can be considered by the trial court when imposing sentence for that is the count the defendant pled guilty to. By the same token, the trial court cannot consider the minutes of testimony that relate to count I and count III for the defendant did not admit those crimes and there is nothing before the court that would tend to substantiate that the defendant did indeed commit those offenses.

With those principles of law in mind, it is clear to me that the sentencing court did not rely on the unproven and unestablished crimes of count I and III. As noted during the course of the sentencing, the trial judge stated, "Granting a probation in this case is denied because it is unwarranted in order to protect the public from further criminal activity by the defendant and would unduly lessen the seriousness of the offense." After the defendant was advised of his right to appeal and the court corrected itself by fixing bond on appeal, the full text of the trial court's additional remarks is as follows:

> I would also state for the record in addition to the reasons I have indicated in my formal order and in reviewing the facts of this case, that is

> the minutes of testimony as well as the presentence investigation, I think it is fair to say these acts took place over a long period of time. That there was numerous sexual activity, that at various times pictures were taken, oral sex, finger digital intercourse, use of marijuana and liquor, to perhaps make this victim more inclined to be involved in this activity. It's not like it was a one-time thing. This is a designed thing over a long period of time and that also went into the court's reasoning in pronouncing this sentence. You're excused. Take a seat over there.

To have a complete understanding of the problem, reference must be made to the full text of the minutes of testimony of the victim under count II. In this regard, the aforesaid statement by the court follows the minutes of testimony of the victim under that count. The acts the defendant pled guilty to as it relates to count II did take place over a long period of time. The minutes of testimony relating to count II reveal that there were numerous incidents of sexual activity, that at various times pictures were taken of the victim, there was oral sex and finger digital intercourse. In addition, the victim under count II was willing to testify that marijuana and liquor was used to make her more inclined to be involved in this activity. The court was correct in observing that this was "not like it was a one-time thing. This is a designed thing over a long period of time . . . ." Again the court had reference to the crime under count II and acted properly when it took into consideration all of the acts inflicted upon the victim by the defendant for this is the crime the defendant pled guilty to.

In conclusion, it is clear to me that the court, when pronouncing sentence, considered the facts and circumstances as they relate to the count which the defendant pled guilty to along with the presentence investigation report. I find no abuse of discretion and would affirm.