FILED
AUG - 9 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff - Appellee,	)	Filed August 9, 1979
vs.	)	
TIMOTHY LEE CONARD,	)	177 62859
Defendant - Appellant.	)	

Appeal from Des Moines District Court - D. B. Hendrickson, Judge.

Defendant appeals from a twenty-five year sentence for murder in the second degree, alleging that the sentence was excessive and that the trial court improperly considered the provisions of the new criminal code. - Affirmed.

William L. Dowell, 8B Judicial District Office of Public Defender, Burlington, for Defendant - Appellant.

Thomas J. Miller Attorney General of Iowa, Kermit Dunahoo, Assistant Attorney General, and Steven S. Hoth, Des Moines County Attorney, Burlington, for Plaintiff - Appellee.

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

PER CURIAM

Defendant appeals from a twenty-five year sentence imposed following his plea of guilty to an open charge of murder and the trial court's finding of guilty of murder in the second degree. Defendant contends that the sentence was excessive and that the trial court improperly considered the penalty provisions of the new criminal code. We affirm.

Eighteen year old Timothy Lee Conard was arrested and charged with the murder of Jerry Lee Connelley, also eighteen. After arrest and throughout questioning, Conard was extremely nervous; one officer testified that in his eight years of police work he had never seen anyone who appeared so frightened. Conard stated that he feared another man, Donnie Horn, would kill him.

Evidence showed that Donnie Horn had on two occasions unsuccessfully solicited the killing of Connelley. On the day of the murder, Horn approached Conard, showed Conard a piece of paper, told Conard that this paper represented a contract on his life and that if Conard did not kill Connelley, he would be dead within the next twenty-four hours. He then gave Conard a gun.

Conard testified that he left with no intentions of carrying out Horn's directions but that he went to see Connelley to find out what was going on. When together, Connelley told Conard that he feared Horn was out to get him. Conard stated that this conversation triggered his own fears of Horn and that on impulse he pulled out the gun and shot Connelley. After the shooting, Conard returned to the apartment of friends where he broke down emotionally and told one friend what he had done.

Testimony at the trial of Donnie Horn showed that Horn was adept at controlling people. Testimony further showed that Conard was fearful of and easily influenced by Horn. A psychologist's report stated that while Conard knew right from wrong, it was quite obvious that his behavior in killing Connelley was dictated by his needs rather than his beliefs and that Conard would perceive the threat to his life as real and would act upon that threat. Testing revealed that Conard had marked feelings of inferiority and inadequacy and that he did not cope well in stressful situations. He has problems with impulse control and pressure exerted by someone with authority over him could trigger an impulse reaction. Conard's shooting of Connelley was seen as a likely impulsive

reaction.

Horn was subsequently convicted of first degree murder. Conard cooperated fully throughout his trial.

The presentence report showed a prior juvenile conviction of armed robbery, for which Conard successfully completed probation. He also had a speeding violation. Conard did not finish high school and was unemployed at the time of arrest. He admitted to former excessive use of alcohol and drugs and to receiving money from sources that were not always legal.

The trial court considered the circumstances surrounding the crime and found Conard guilty of second degree rather than first degree murder. Defendant maintains that these same circumstances, along with the results of psychological testing and Conard's cooperation throughout the trial of Horn, serve as evidence that the sentence of twenty-five years to the Men's Reformatory in Anamosa is excessive. Defendant also claims that the trial court improperly considered the provisions of the new criminal code in entering sentence. According to sections 707.3 and 902.9(1), Supplement to the Code 1977, the maximum sentence for second degree murder is twenty-five years; according to section 690.3, The Code 1977, the maximum sentence for second degree murder is life and the minimum is ten years. The State maintains that Conard's sentence falls within the statutory limits of the old code and that the trial court properly considered the provisions of the new code.

A reviewing court will not disturb the sentence and judgment rendered by the trial court where judgment is within the statutory maximum and where no abuse of discretion is shown. State v. Thompson, 275 N.W.2d 370, 371 (Iowa 1979); State v. Moreland, 252 N.W.2d 465, 466 (Iowa 1977); State v. Kendall, 167 N.W.2d 909, 911 (Iowa 1969). A reviewing court's power, pursuant to section 793.18, The Code 1977, to examine the judgment and to reduce the penalty if deemed to be improper is sparingly used. State v. Hubbs, 268 N.W.2d 188, 191 (Iowa 1978). In determining the proper sentence to be imposed, the trial court and the reviewing court should weigh and consider all pertinent matters, including the nature of the offense and circumstances attending it, defendant's age and character, and defendant's chances for reform. Kendall, 167 N.W.2d at 911.

Here the trial court's articulation of its rationale indicates that it was seriously

concerned with the nature of the offense and that it was influenced by the penalty provisions of the new code, which took effect shortly after the commission of this crime. While the provisions of the new code are not controlling in imposing sentence in this case, it is proper to consider the new code in ascertaining present legislative intent. Hubbs, 268 N.W.2d at 191. The trial court properly limited its reference to the new code to the purpose of determining legislative intent. Although the trial court failed to articulate factors relating to the circumstances of the crime and defendant's age, character, and hope for reform, the court's statement of findings preceeding its determination of defendant's guilt of murder in the second degree shows that it was aware of these matters in sentencing defendant. Furthermore, our review of the record leads us to conclude that the trial court did not abuse its discretion in imposing a sentence which was well within the statutory maximum of the old criminal code.

AFFIRMED.