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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed December 18, 1985
		340
vs.	)	
DAVID A. BUCHANAN,	)	5-514 84-1866
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Scott County - James R. Havercamp, Judge.

Defendant appeals from the sentences imposed following his convictions of operating a motor vehicle while intoxicated, second offense, and assault with intent to inflict serious injury. **AFFIRMED.**

W. Michael Shinkle, Davenport, for defendant-appellant.

Thomas J. Miller, Attorney General; Roxann M. Ryan, Assistant Attorney General; and Bobbie Alpers, Assistant County Attorney, for plaintiff-appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ., but decided en banc.

Defendant appeals from the sentences imposed following his convictions of operating a motor vehicle while intoxicated, second offense, and assault with intent to inflict serious injury. Defendant asserts (1) that the trial court abused its discretion in denying his request for probation, and (2) that the trial court failed to state on the record its reasons for imposing sentences of two years imprisonment on each of his two convictions. We affirm.

Defendant, David A. Buchanan, apparently had a fight with another man in a bar and later, while intoxicated, used his car to run the man down. Defendant entered guilty pleas to two aggravated misdemeanor charges based on the incident: operating a motor vehicle while intoxicated, second offense (a violation of Iowa Code section 321.281), and assault with intent to inflict serious injury (a violation of Iowa Code section 708.2(1)).

A presentence investigation report was prepared. At the sentencing proceeding, defendant requested probation. The trial court denied this request, stating: "The fact of the matter is that the defendant used his vehicle and ran . . . another individual down and caused serious injuries. . . . this is an aggravated situation and it calls for something other than probation." The trial court then imposed sentences of two years' imprisonment on each of the two convictions, with the sentences to be served concurrently. Defendant appealed.

I.

As to defendant's denial of probation claim, Iowa Code section 907.5 (1985) provides:

> Before deferring judgment, deferring sentence, or suspending sentence, the court first shall determine which option, if available, will provide maximum opportunity for the rehabilitation of the defendant and protection of the community from further offenses by the defendant and others. In making this determination the court shall consider the age of the defendant; the defendant's prior

> record of convictions and prior record of deferments of judgment if any; the defendant's employment circumstances; the defendant's family circumstances; the nature of the offense committed; and such other factors as are appropriate. The court shall file a specific written statement of its reasons for and the facts supporting its decision to defer judgment, to defer sentence, or to suspend sentence, and its decision on the length of probation.

An appellate court will not find an abuse of discretion in denying probation unless the "discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982); State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979). Defendant maintains the probation officer submitted a lengthy presentence investigation report which recommended probation and that the trial court abused its discretion by denying probation. We disagree.

The record indicates the trial court did consider the report because he referred to facts contained in the report several times. He stated:

> The recommendation of the presentence investigator was for probation. I am not able to consider this a situation where I believe probation is a satisfactory result. The fact of the matter is that the defendant used his vehicle and ran another vehicle—another individual down and caused serious injuries. . . . And regardless of how much you might have been influenced by your substance abuse, and regardless of the fact that you have made great strides towards, for the first time, addressing that substance abuse problem, we have a situation here that is extremely serious in its consequences. You seriously injured another individual and you have done so in a criminal context, not simply as a result of negligence or some other civil liability which might abide, and I have to, I think, address it in that regard. It is not a matter, it seems to me on the state of the record, of a simple operating while intoxicated which an accident resulted and injury also resulted. I think we are one step beyond that. I think that the state of the record reflects precisely what I have indicated it reflects. . . . I'm rejecting your application for probation. I don't think it's appropriate in this case. There are aggravating circumstances and I think they should be dealt with. It does not diminish his attempt to treat his substance abuse problem. That's necessary. He's going to have to do that regardless of

> what happens today in this courtroom. But this is an aggravated situation and it calls for something other than probation.

While the trial court did not follow the probation officer's proposed correctional plan, the report undoubtedly was considered in the decision to deny probation. We are aware of no authority which provides that a trial court must follow the recommendation of probation. The trial court felt this was a serious crime and probation can be refused when such punishment would unduly deprecate the seriousness of the crime. Morrison, 323 N.W.2d at 256-57. The trial court considered defendant's employment as a truck driver and the family support he was receiving in regards to his treatment for alcohol abuse. We find that the grounds for denying probation were stated on the record and were reasonable.

II.

Iowa Rule of Criminal Procedure 22(3)(d), in relevant part, provides that: "The court shall state on the record its reason for selecting the particular sentence. When a trial court does not adequately state its reason for imposing the sentence, the sentence must be vacated or remanded for resentencing." State v. Smith, 309 N.W.2d 454, 457 (Iowa 1981); State v. Worley, 297 N.W.2d 368, 372 (Iowa 1980); State v. Wilson, 294 N.W.2d 824 (Iowa 1980). This requirement enables the appellate court to determine whether an abuse of discretion has occurred. State v. Matlock, 304 N.W.2d 226, 228 (Iowa 1981); State v. Luedke, 279 N.W.2d 7, 8 (Iowa 1979).

A sentence must fit the person and circumstances and the sentencing decision must be made on an individual basis where no single factor is determinative. State v. Dvorsky, 322 N.W.2d 62, 67 (Iowa 1982); State v. McKeever, 276 N.W.2d 385, 387 (Iowa 1979).

The trial court considered the fact that defendant used his vehicle to run an individual down and cause a serious injury. The trial court felt this was

an egregious circumstance which required the maximum sentence. We find this an adequate reason for imposing the sentence.

Therefore, we affirm the trial court's decision.

AFFIRMED.

All judges concur except Schlegel and Sackett, JJ., who dissent.

SCHLEGEL, J. (specially concurring)

I agree that the trial court did not abuse its discretion in refusing to grant probation in this case. I believe, however, that the majority has upheld the sentences for the wrong reasons.

Iowa Code section 907.5 (1985), as set out in the majority opinion, requires the court to determine:

> . . . which option, if available, will provide maximum opportunity for the rehabilitation of the defendant and protection of the community from further offenses by the defendant and others.

To make that determination, the court shall consider those numerous items set out in the code section, including "the nature of the offense committed," and such other factors as are appropriate. No single factor is determinative. State v. Dvorsky, 322 N.W.2d 62, 67 (Iowa 1982).

The flaw in the sentencing (which I am not prepared to say was fatal) is that the court really determined the sentence to be imposed on the basis of only one factor. Both the sentencing court and the majority of this court speak only of the serious nature of the offense committed by defendant. The trial court states: "There are aggravating circumstances and I think they should be dealt with." The majority characterizes the situation as "an egregious circumstance which required the maximum sentence."

I gather that neither the sentencing court nor the majority believe any other treatment will be rehabilitative for the defendant. From the record, however, it may be concluded that because of the seriousness of the offense, incarceration was selected as being necessary to protect society from the defendant and others similarly inclined. While the sentencing record does not strictly comply with rule 22(3)(d), in that one must infer the reasons from the record, authority exists to uphold the sentence in this case.

Although there is nothing to indicate that such was the reason for the sentence, it is possible that defendant's sojourn through the corrections system will provide additional motivation for his continued efforts to overcome his alcohol abuse. To that extent, the sentence can have a rehabilitative effect. Such a plan could be a proper justification for the sentence imposed.

As we can readily see, the ingredients are all present for the sentencing judge to state, on the record, that the sentence imposed "will provide maximum opportunity for the rehabilitation of the defendant and the protection of the community from further offenses by the defendant and others." What a pity that the judge's remarks, at first glance, seem to speak only of the need for punishment, because of the seriousness of the offense, and that the appellate court must search for a meaning that enables it to say that the sentences were not an abuse of the sentencing court's discretion.

Sackett, J., joins.