FILED
JAN 29 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

421

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

JEROME CHARLES HARMS,)

Defendant-Appellant.)

Filed January 29, 1985

4-489
84-679

Appeal from the Iowa District Court for Dickinson County, Murray S. Underwood, Judge.

Defendant appeals from the sentence imposed on his conviction of possession of cocaine with intent to deliver. Defendant asserts: (1) that the district court abused its discretion and subjected him to cruel and unusual punishment when it sentenced him to a prison term of up to ten years; (2) that the district court failed to state adequate reasons for selecting this sentence; and (3) that the supreme court should adopt certain ABA standards for appellate review of sentencing. AFFIRMED.

Patricia M. Hulting of Roehrick & Hassel, Des Moines, for defendant-appellant.

Thomas J. Miller, and Mickey W. Greene, Assistant Attorney General, for plaintiff-appellee.

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

OXBERGER, C.J.

The defendant has appealed from his sentence of no more than ten years in prison for possession of a controlled substance with intent to deliver. We affirm.

Defendant Jerome Charles Harms was arrested in a friend's house; he had in his possession three grams of cocaine in seven wax paper containers. He was charged with delivery or possession of cocaine with intent to deliver, conspiracy to deliver cocaine or possess it with intent to deliver, and aiding and abetting the delivery of cocaine. Defendant entered a plea of guilty to the charge of possession of cocaine with intent to deliver, pursuant to a plea bargain under which the prosecutor agreed to dismiss the remaining charges.

A presentence investigation report was prepared and indicated that defendant was thirty-five years old and had never married; that he was a Vietnam veteran; that he lived with his parents and was employed full-time on their farm; that his father had cancer and that he drove his father back and forth for treatments; that his criminal record consisted of one conviction as a juvenile of possession of beer and one conviction as an adult (in 1981) of OMVUI; that he denied abusing drugs or alcohol; that he had begun experimenting with drugs in the mid-1960s; that he was still using marijuana and appeared unwilling to either quit using it and other drugs, or to break his ties with the drug culture; and that he believed the laws on marijuana and cocaine should be changed. The presentence investigator recommended that defendant be incarcerated.

At the sentencing proceeding, defendant admitted that he had weighed the cocaine and had added vitamin C to it to increase its bulk, but he asserted that this was to make it last longer. Defendant and his father both testified that his father would probably be unable to continue farming because of his health.

The district court sentenced defendant to a prison term of up to ten years. It stated its reasons for selecting imprisonment were that the sentence was

consistent with the plea bargain, it was "authorized by law," and that the sentence would give "maximum opportunity for the rehabilitation of this defendant and the protection of this community from further offenses by this defendant and others." The district court also stated that it had considered the nature of the offense, the manner in which it had been committed, defendant's criminal record, and defendant's age, family situation, and employment circumstances. Defendant has appealed from his sentence.

Defendant alleges that the sentence: (1) constitutes cruel and unusual punishment; (2) shows abuse of discretion on the part of the court; (3) that inadequate reasons were presented by the court for its sentence; and (4) urges this court to accept the ABA standards for sentencing despite rejection of such claims by the Iowa Supreme Court.

Defendant initially contends the sentence constitutes cruel and unusual punishment, since his behavior is on the low end of offenses which the law proscribes. The State contends this is only one factor that the court should consider in sentencing. State v. Remmers, 259 N.W.2d 779, 782-83 (Iowa 1977). Harms also says the probation officer's conclusion that he was likely to commit the crime again is contrary to statistics showing a person committing a felony for the first time at the defendant's age is unlikely to commit another crime.

Cruel and unusual punishment is defined as that inflicting torture or which is barbaric or so severe that it is disproportionate to the offense. State v. Robbins, 257 N.W.2d 63, 68 (Iowa 1977). The Supreme Court has stated three considerations in determining if a sentence is disproportionate to the crime. Solem v. Helm, ____ U.S. ____, _____, 103 S. Ct. 3001, 3003, 77 L. Ed. 2d 637, 641 (1983). Courts must weigh the offense with the harshness of the penalty, then compare the sentence with those imposed for other crimes in the jurisdiction where the sentencing was given, and compare it to sentences imposed for the same crime in other jurisdictions. Id.

The State points out that other class "C" felonies in Iowa include possession of burglary tools, second-degree robbery, first-degree theft, and first degree criminal mischief. Iowa Code §§ 713.7, 711.3, 714.2, 716.3 (1983). The State contends this shows the sentence is not out of line with other crimes receiving the same penalty. Further, other jurisdictions impose similar penalties for this crime including up to fifteen years in Florida, and up to seven years in New York. Fla. Stat. Ann. § 893.13 (1981); N.Y. Penal Law § 220.06 (McKinney 1980). Weighing the factors set out in Solem, the punishment does not violate the eighth amendment of the United States Constitution.

The State says we should not hear defendant's claim of abuse of discretion, saying it is barred pursuant to Iowa R. App. P. 14(a)(3) because defendant allegedly has made no argument on this issue. While defendant's headings of the issues might have been separated from other issues to present the arguments more clearly, defendant has addressed the question in his brief.

Sentences are set aside by appellate courts only if there is proof of abuse of discretion by the trial court. State v. Carey, 306 N.W.2d 740, 742 (Iowa 1981). There are many factors to be considered in addition to those favoring probation for the defendant, and the court's decision here was within its reasonable options.

Abuse of discretion may also occur if the court has presented insufficient reasons for pronouncing a particular sentence. State v. Luedtke, 279 N.W.2d 7, 8 (Iowa 1979). The reasons presented by the court, as set out above, appear to be a mere restatement of the factors required to be considered in sentencing set out at Iowa Code § 901.5 (1983). Our court has indicated the purpose of Iowa Rule of Criminal Procedure 22(3)(d) requiring the court to articulate reasons for imposing a sentence, is to provide appellate courts with better review of the trial court's decision. State v. Carey, 306 N.W.2d 740, 742 (Iowa 1981). Obviously, merely restating the statutory considerations is of little help in appellate review. However, a review of the entire record shows that a major factor swaying the

court in favor of imprisonment is the fact that defendant does not believe his conduct was wrong. The court's apparent reasoning is that if defendant is not imprisoned, he and others would not be deterred from future involvement in drugs the legislature has declared illegal to possess or use. Such reasoning does not constitute an abuse of discretion.

Defendant's last argument is to urge the courts once again to adopt the ABA standards for sentencing. As defendant points out, studies have shown drastic disparity in sentences imposed for the same crimes in different judicial districts. Felony Sentencing Practices In Iowa, 1974-1978, Analysis of Sentencing Disparities Among Major Counties and Rural Areas in the State's Eighth Judicial Districts, Sentencing Disparity Study Committee of the Iowa Judicial Council by the Statistical Analysis Center, Office for Planning and Programming, State of Iowa, 1980. It cannot be disputed that there is little logic that incarceration rates of Woodbury County for violation of drug laws are 13.1 percent, while the rate in Marshalltown is 78.2 percent. Id. The county in which defendant resides has been rated third highest in likelihood of incarceration. Id.

The place where the offense occurs should not be the overriding factor in determining the type of sentence imposed. It has no relation to the goals of justice of deterrence, protection of society, and rehabilitation. Standards to be used as guidelines could be helpful in this area. However, our supreme court has repeatedly stated that Iowa Rule of Criminal Procedure 22(3)(d) and our sentencing statutes are adequate to satisfy the demands of justice. State v. Carey at 742; (citations omitted). Because of the binding authority of this precedent, we must reject defendant's arguments in this area.

AFFIRMED.