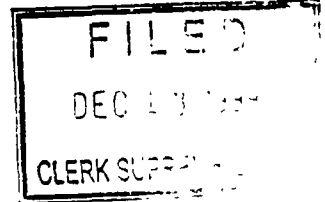


IN THE COURT OF APPEALS OF IOWA

No. 1999-271 (9-501) / 98-1781

Filed December 13, 1999



STATE OF IOWA,
Plaintiff-Appellee,

vs.

ERIC TERWILLIGER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Linda R. Reade, Judge.

Defendant appeals from the sentences rendered following his convictions for possession of a controlled substance with intent to deliver and sexual exploitation of a minor. He contends the court abused its discretion in sentencing by relying solely on the nature of the offense and in considering other unprosecuted charges.

AFFIRMED.

Alfredo Parrish of Parrish, Kruidenier, Moss, Dunn & Montgomery, L.L.P.,
Des Moines, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney
General, John P. Sarcone, County Attorney, and Steve Foritano, Assistant County
Attorney, for appellee.

Heard by Sackett, C.J., and Zimmer and Miller, J.J.

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SACKETT, C.J.

Defendant Eric Terwilliger appeals from a sentencing order entered on September 30, 1998, after he pled guilty to possession of a controlled substance (methamphetamine) with intent to deliver, and sexual exploitation of a minor. Each sentence was for a period not to exceed ten years, and the sentences were ordered to be served consecutively. Defendant claims that the court abused its discretion in ordering that the sentences be served consecutively and for considering other unprosecuted charges, as well as facts in the minutes of testimony to which defendant did not admit in its determination of these sentences. We affirm.

On February 11, 1998 over seven grams of methamphetamine was obtained from defendant's home following a search warrant. This search also resulted in several undeveloped rolls of film being seized from defendant's home. One roll showed provocative photographs of the seven-year-old niece of defendant's girlfriend.

On February 24, 1998, defendant was charged by trial information with 1) possession of a controlled substance (methamphetamine) with intent to deliver, in violation of Iowa Code section 124.401(1)(b)(7) (1997); 2) failure to possess a tax stamp, in violation of Iowa Code sections 453B.3 and 453B.12 (1997); 3) possession of a controlled substance with intent to deliver (cocaine), in violation of Iowa Code section 124.401(1)(c)(2)(b) (1997); and 4) possession of a controlled substance (marijuana), in violation of Iowa Code section 124.401(5) (1997).

On July 30, 1998, defendant was charged by trial information with sexual exploitation of a minor, in violation of Iowa Code sections 728.12(1) and 728.1(6)(g) (1997). The trial information alleged that defendant committed this crime on or about 1997-1998.

On August 14, 1998 the state amended the four charges contained in the February 24, 1998 trial information to one count of possession of a controlled substance (methamphetamine) with intent to deliver, pursuant to Iowa Code section 124.401(1)(c)(6), a class "C" felony.

Defendant agreed to plead guilty to the charge of possession of a controlled substance (methamphetamine) with intent to deliver as charged by the amended trial information in the first case and to sexual exploitation of a minor in the second in exchange for the dismissal of the remaining charges. At the guilty plea hearing, defendant admitted he allowed a minor child to be photographed nude for his own sexual pleasure, sometime in late 1997 or early 1998. The trial court accepted the plea, finding that it was entered voluntarily and with a factual basis.

Defendant submitted a statement to the court in which he admitted having been a meth addict for ten years and he supported this habit by distributing the drug. He also admitted taking "tasteless" pictures of the child one night while on synthetic heroin.

At the sentencing hearing defense counsel stated that either a suspended or a ten-year concurrent sentence was appropriate. He requested that the court consider

factors such as defendant was a first time offender, letters from family and friends which indicated that he was a good person who had fallen in with the wrong people, that he had not actively tried to find a sexual abuse victim, and that defendant recognizes his need for drug rehabilitative treatment and counseling. The state recommended two consecutive sentences of up to ten years. The judge agreed with the recommendations of the presentence investigator that defendant serve his sentences consecutively for a maximum of up to twenty years.

An order was entered on September 30, 1998, in which defendant was adjudged guilty of possession of a controlled substance and sexual exploitation of a minor. Defendant was sentenced to serve up to ten years for each charge, with the sentences to run consecutively. Counts two, three and four of the original trial information in the first case were dismissed pursuant to the plea agreement.

In the order, it was stated that:

Consecutive sentences are imposed because of the seriousness of the offenses and because the offenses occurred on separate days and constitute separate criminal conduct. The sexual exploitation occurred on several dates, on a vulnerable victim (a child) and the county attorney has charged only one count in spite of the fact there were separate criminal incidents. Granting probation in this case is denied because to impose a probationary sentence would lessen the seriousness of the offense.

Defendant makes two claims on appeal. First, he contends that the court abused its sentencing discretion by giving consideration to only one factor, the nature of the offense. Second, he argues that the court also abused its discretion by relying on the unprosecuted charges that were set forth in counts two, three and four of the

~~original trial information~~ and by considering facts set forth in the minutes of testimony which were not admitted by defendant.

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4, *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996).

The charges for which defendant was convicted do not carry mandatory sentences. Therefore, as class "C" felonies, the maximum sentences for these are governed by Iowa Code section 902.9(3), which provides for a period of confinement of no more than ten years.

Iowa Code section 901.8 states that "If a person is sentenced for two or more separate offenses, the sentencing judge may order the second or further sentence to begin at the expiration of the first or succeeding sentence."

When a sentence is not mandatory, the district court must exercise its discretion in determining what sentence to impose. *Thomas*, 547 N.W.2d at 225. The court also generally has discretion to impose concurrent or consecutive sentences for convictions on separate counts. *State v. Delaney*, 526 N.W.2d 170 (Iowa App. 1994).

Sentencing decisions of the district court are cloaked with a strong presumption in their favor. *Thomas*, 547 N.W.2d at 225. An abuse of discretion is found only when the sentencing court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

Defendant asserts that the court failed to state the precise reasons why a longer period of confinement was necessary through consecutive sentences.

A trial court is required to state on the record its reasons for selecting the particular sentence. Iowa R. Crim. P. 22(3)(d). The explanation does not need to be detailed, but enough must be provided to permit review of the trial court's discretionary action. *State v. Delaney*, 526 N.W.2d at 178. A sentencing court's statement of its reasons satisfies the rule if it recites reasons sufficient to demonstrate the exercise of discretion and indicates those concerns which motivated the court to select the particular sentence which it imposed. *State v. Garrow*, 480 N.W.2d 256, 259 (Iowa 1992). However, it is not required to give its reasons for rejecting particular sentencing options. *Thomas*, 547 N.W.2d at 225.

The duty of a sentencing court to provide an explanation for a sentence includes the reasons for imposing consecutive sentences. *Delaney*, 526 N.W.2d at 178. The reasons, however, are not required to be specifically tied to the imposition of consecutive sentences, but may be found from the particular reasons expressed for the overall sentencing plan. Accordingly, the entire record is reviewed to find the supporting reasons. *Id.*

It is apparent that the district court ordered defendant to serve his sentences consecutively as part of an overall sentencing plan. The court mentioned several reasons in its sentencing order for imposing its sentence including that consecutive sentences were imposed because of the seriousness of the offenses, the sexual exploitation involved a vulnerable victim (a child), as well as that the offenses occurred on different days and constituted separate criminal conduct. It is also clear

~~from the sentencing colloquy, that the judge considered the results of the presentence investigation in her decision.~~

In *State v. Johnson*, 445 N.W.2d at 343, it was held that the court's statement that it was sentencing defendant to two consecutive terms because there were two separate offenses of sexual abuse, each involving a different victim, was sufficient. The present case is similar to *Johnson* in that it involved two separate offenses, one of possession of a controlled substance with intent to deliver and sexual exploitation of a minor. These offenses occurred on separate days. Defendant had possession of the methamphetamine on February 11, 1998, but had taken the photographs in 1997 or 1998. Accordingly, it was appropriate for the district court to sentence defendant to consecutive terms.

Johnson differs from the case at bar in that in *Johnson* the judge specifically enumerated the factors contained in the presentence investigation report which had been considered. However, in the present case even though the judge did not state the findings of the presentence investigation report on the record at sentencing, they were fully discussed by defense counsel and the prosecutor at the hearing. Thus, when the judge stated that she was in agreement with the recommendations of the presentence investigator, it was clear what factors had been considered with reference to the presentence investigation report. In other words, in both *Johnson* and the present case, the specific findings of the presentence investigation report being considered

~~were clear. We~~ therefore hold, in light of *Johnson*, that the reasons for the court's sentencing decision were adequately explained.

Defendant argues that the court abused its discretion in that it relied solely on the nature of the offense in its decision to order consecutive ten-year sentences. In support of his argument, defendant focuses on a comment that was made by the judge at the sentencing hearing that "Your conduct, sir, is totally reprehensible. It makes me sick".

In *State v. McKeever*, 276 N.W.2d 385, 387 (Iowa 1979), the court stated that although the "nature of the offense" is one factor to be considered, the punishment must fit the particular person and circumstances under consideration so that each decision is made on an individual basis and that no single factor, including the nature of the offense, will be solely determinative. Here, it is evident from our previous discussion of the reasons for the sentence, that the nature of the offense was not the only factor considered. Accordingly, we hold that the court did not abuse its discretion in this regard.

Defendant also makes the same argument with respect to the court's denial of a suspended sentence and probation. In its order, the court stated: "Granting probation in this case is denied because to impose a probationary sentence would be to lessen the seriousness of the offense."

Before suspending a sentence, the court first shall determine which option, if available, will provide maximum opportunity for rehabilitation of defendant and

protection of the community from further offenses by defendant and others. Iowa Code § 903.1, *State v. Pappas*, 337 N.W.2d 490, 493 (Iowa 1983). In making this determination, the court shall consider the age of defendant, the defendant's prior record of convictions and prior record of deferments of judgment, if any, the defendant's employment and family circumstances, and the nature of the offense committed. *Id.*

We hold that the court did not abuse its discretion given the context in which the decision to deny a suspended sentence and probation was made. It is evident these factors were considered by the court as well as the nature of the offense. In addition, these factors did not weigh in defendant's favor. The presentence investigation file showed defendant was unemployed at the time of arrest. He had seldom held a steady job. He had a drug problem for ten years. He had never sought treatment and did not acknowledge the problem until he was caught by police.

Finally defendant contends the district court relied on facts contained in the minutes of testimony that were not admitted and unprosecuted offenses in making its sentencing decision. The judge at sentencing said:

The county attorney has charged only one count in spite of the fact it appears that this was an ongoing situation for an extended period of time ... Pursuant to the plea agreement, Counts 2 through 4 of FE122518 are dismissed. Of course in that case defendant pled guilty to an amended Count 1 which lowered the criminal penalties in the drug count; otherwise, he would be serving more time.

In *State v. Black*, 324 N.W.2d 313,315 (Iowa 1982), the court noted that:

A court may not impose a severe sentence for a lower crime on the ground that the accused actually committed a higher crime unless the facts before the court show the accused committed the higher crime or defendant admits it-even if the prosecutor originally charged the higher crime and reduced the charge. The accused does not admit the higher charge by pleading guilty to the lower charge.

In *Black*, defendant had pleaded to a serious misdemeanor charge of indecent exposure and was sentenced to the maximum term of incarceration. Defendant claimed that the district court erred in giving consideration to a burglary charge that had been dismissed pursuant to a plea bargain. The minutes of testimony stated that the victim would testify that she awoke to find defendant in her home. Defendant had only partially admitted to the facts which supported this story. In the presentence report and a statement to the court, he claimed that he had gone to the victim's home because he knew her, had knocked at the door and was voluntarily let in. The victim had also allowed him to spend the night.

At sentencing the judge commented that defendant's plea to indecent exposure did not believe that in return for that plea the state dismissed the burglary charge. He also stated that the facts indicated that he entered the private residence of a total stranger, and in effect, held that person at bay all night long. Further, he told defendant that the circumstances of which the offense arises are of such a severity that you need something to remind you that you do not enter people's houses without permission.

~~It was held that it was improper for the court to base its sentence in part on the unprosecuted burglary charge.~~ *Black*, 324 N.W.2d at 316. The Supreme Court found that the district court had erred by considering the alleged illegal entry into the victim's home although the entry had not been proved nor, since illegal entry is not an element of the crime of indecent exposure, had it been admitted in the guilty plea. *Id.* The court also found that even though the use of the minutes have been approved to establish a factual basis for a charge for which defendant pleads guilty, where portions of the minutes are not necessary to establish such a factual basis and are denied by defendant and otherwise disproved, there was no basis to allow the sentencing court to consider and rely on these portions. *Id.*

Defendant argues that the present case is analogous to *Black*. Regarding the charges of possession of a controlled substance (methamphetamine) with intent to deliver, the difference between Iowa Code section 124.401(1)(b)(7), which was used in the original trial information, and section 124.401(1)(c)(6), is based on the amount of methamphetamine found to possessed. The first code section covers amounts over five grams of the drug, while the second applies to amounts less than or equal to five grams. Nowhere does the trial court refer to the minutes in which it is stated that eight grams were seized. Instead, the judge's comments were that this had been an ongoing situation for an extended period of time. Defendant had admitted he had been a meth addict for ten years. The district court considered information in the trial

~~information on the drug charge~~ that had been admitted by defendant. This distinguishes this case from *Black*.

Even if one construes the judge's comments during sentencing to mean the judge thought defendant should have served more time because he had originally been charged with a higher crime, this statement can be interpreted to mean that the defendant was lucky to get the sentence imposed.

There is no indication, as the defendant argues, that the district court considered the charges of failure to possess a tax stamp and possession of a controlled substance (cocaine) with intent to deliver or possession of a controlled substance (marijuana). In order to overcome the presumption the district court properly exercised its discretion, there must be an affirmative showing the court relied on improper evidence. *State v. Sailor*, 587 N.W.2d 756, 762 (Iowa 1998). Defendant has failed to show the district court relied on improper evidence of these unprosecuted or unproven offenses. The district court did not abuse its discretion in this regard.

AFFIRMED.