IN THE COURT OF APPEALS OF IOWA

No. 5-730 / 95-575

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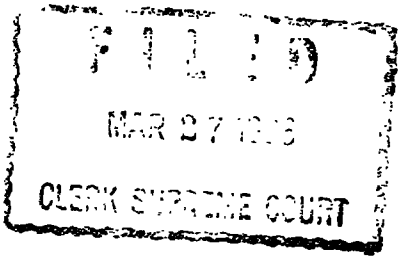
STATE OF IOWA,

Appellee,

vs.

ROBERT MICHAEL LITWILLER,

Appellant.



Appeal from the Iowa District Court for Scott County, John A. Nahra and David E. Schoenthaler, Judges.

The defendant appeals his conviction and sentence for assault with intent to commit sexual abuse. **AFFIRMED.**

Kyle D. Williamson of Wells, Bowman & Smith, Davenport, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, William E. Davis, County Attorney, and Kelly Raines and Hubert Pries, Assistant County Attorneys, for appellee.

Considered by Sackett, P.J., and Cady and Huitink, JJ.

CADY, J.

Robert Litwiller appeals his judgment and sentence for the crime of assault with intent to commit sexual abuse. He claims his plea of guilty was involuntary, the trial court abused its discretion in denying probation, and his counsel was ineffective. We affirm.

Litwiller was a twenty-three-year old instructor of karate at a fitness center in Eldridge, Iowa. He was charged by trial information with third-degree sexual abuse, lascivious acts with a child, and assault with intent to commit sexual abuse after he engaged in sexual intercourse with a fourteen-year old female student. Litwiller took the girl on a hike to a secluded area of Scott County Park and convinced her to remove her clothing as part of a test to determine if she was ready to assume karate teaching responsibilities. After massaging the girl's body, and expounding on his theories of spirituality and nature, Litwiller engaged in sexual intercourse.

Litwiller eventually entered a plea of guilty to one count of assault with intent to commit sexual abuse. The district court sentenced him to a term of incarceration not to exceed two years and fined him $2,500.

Litwiller now claims his plea was involuntary because the trial judge did not adequately probe into his understanding of plea agreement and confirm with him that incarceration could be imposed. He also claims the trial court abused its discretion in denying probation. Finally, he argues his attorney was ineffective for failing to

challenge certain statements made by the prosecutor at the plea proceeding and for failing to request a deferred judgment at the sentencing hearing.

We first consider Litwiller's claim his plea of guilty was not voluntary. This claim was not properly preserved by filing a motion in arrest of judgment under Iowa R. Crim. P. 23(3), or by a motion to withdraw the plea under Iowa R. Crim. P. 8(2)(a). Nevertheless, we find no merit in the underlying claim. Litwiller was told incarceration was one of the sentencing options, and he acknowledged no promises or predictions about the sentence had been made to him.

We next address Litwiller's claim the sentencing court abused its discretion in denying probation. Discretion in sentencing is abused only when it is exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Neary*, 470 N.W.2d 27, 29 (Iowa 1991). We find the sentencing judge considered a broad range of factors, and did not abuse its discretion in imposing sentence.

Finally, we consider Litwiller's claim of ineffective assistance of trial counsel. Having carefully reviewed the record, we are unable to find trial counsel failed to perform an essential duty or that prejudice resulted. *See State v. Risdal*, 404 N.W.2d 130, 131-32 (Iowa 1987). The prosecutor made no misleading or contradictory statements during the plea colloquy which Litwiller's counsel had a duty to challenge. Furthermore, even though no specific request for a deferred judgment was made at the sentencing hearing, there is no showing the request probably would have been granted or a more lenient sentence imposed had a deferred judgment been requested.

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Clearly, the court considered all sentencing options and acted within its discretion in imposing a term of incarceration. Since the sentencing court refused to suspend the sentence and impose probation, it certainly would have denied any specific request for a deferred judgment.

AFFIRMED.