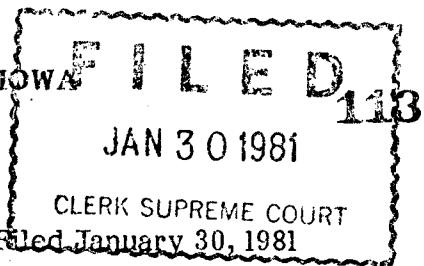


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)
)
Plaintiff-Appellee,)
)
vs.)
)
THOMAS BUCK,)
)
Defendant-Appellant.)

0-396
64367

Appeal from Story District Court - Russell J. Hill, Judge.

Defendant appeals sentence from plea of guilty to two counts of false use of a financial instrument in violation of section 715.6, The Code 1979, alleging 1) that trial court based its sentence on unproven allegations of another crime committed by defendant, 2) that the court did not consider all the factors in section 907.5 in imposing sentence, and 3) that the court did not ask for defendant's consent to a deferred sentence. AFFIRMED.

Dale Sharp of Smith, Nutty, Sharp, Ruigh & Benson, Ames, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Thomas N. Martin, Assistant Attorney General, for plaintiff-appellee.

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

Defendant, Thomas Buck, appeals from the sentence imposed upon his plea of guilty to two counts of false use of a financial instrument in violation of section 715.6, The Code 1979. He alleges 1) that trial court based its sentence on unproven allegations of another crime committed by defendant, 2) that the court did not consider all the factors in section 907.5 in imposing sentence, and 3) that the court did not ask for defendant's consent to a deferred sentence. We affirm trial court's order.

On July 17, 1979, defendant was charged by information with false use of a financial instrument in connection with two blank checks belonging to a Bill Niebur that defendant forged and cashed on May 14 and 15, 1979. Defendant's guilty plea to both counts was entered on September 10, 1979, and a presentence investigation ordered. In sentencing proceedings on October 8, 1979, defendant received a deferred sentence and was placed on probation for five years. His notice of appeal was filed December 6, 1979.

I. Scope of Review. Our review of defendant's appeal is on assigned error only. Iowa R. App. P. 4.

II. Sentencing Errors. Defendant alleges trial court committed numerous errors in the sentencing process. We consider each allegation separately.

A. The Basis for the Sentence. Defendant claims trial court based its sentence in part on unproven allegations of another crime committed by defendant, that defendant had stolen the checks which he then forged and cashed. Defendant denied stealing the checks. Section 907.3 provides in part that "[p]ursuant to section 901.5, the trial court may . . . exercise any of the [sentencing] options contained in subsections 1 and 2 of this section." § 907.3. These options include a deferred judgment (907.3(1)), a deferred sentence (907.3(1)), or a suspended sentence (907.3(2)). Pursuant to 901.5, the court shall determine which of the sentencing options or combination of them, ". . . in the discretion of the court, will provide maximum opportunity for the rehabilitation of the defendant, and for the protection of the community" § 901.5 (emphasis added). As long as the sentence given is within the statutory maximum, trial court will not be reversed unless an abuse of discretion is shown. State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979). " . . . Abuse of discretion is shown only when the one objecting to the ruling has displayed that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. . . ." Id. (quoting State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976)).

In selecting a deferred sentence over a deferred judgment in this case, trial court referred to an earlier (1977) shoplifting charge for which defendant was fined \$30.00 plus costs and then found the current charge of false use of a financial instrument to be another form of thievery. While trial court also made reference to defendant's having been in and out of the victim's room on several occasions (the unproven allegations of another crime giving rise to defendant's claim of error), trial court clearly stated its primary reason for imposition of the deferred sentence was due to the prior shoplifting conviction. (emphasis added.) We note that the presentence investigation report also recommended imposition of a deferred sentence. As in Buck, "[w]e cannot say trial court's discretion was exercised on grounds clearly untenable or unreasonable." Id. We therefore find no abuse of discretion on this issue.

B. Section 907.5 Factors. Defendant next contends that trial court erred in not considering all of the factors set forth in section 907.5. While it is true that trial court here did not address all of the section 907.5 factors in its oral statement of reasons for the sentence, thereby giving rise to the possibility that the sentence was imposed without due regard to other considerations beyond those stated, a review of the record nonetheless reveals that the court had before it the presentence investigation report which did address the section 907.3 factors. The record clearly shows trial court read and considered the presentence investigation and that, therefore, the court had before it all of the factors it was required to consider. We find no error on the part of trial court on this issue.

C. Defendant's Consent to Sentencing. Defendant lastly contends trial court erred in failing to ask for defendant's consent to a deferred sentence. Section 907.3(1) states that "[w]ith the consent of the defendant, the court may defer judgment ... or defer sentence" § 907(3)(1). A review of the record shows that defendant directly requested and thereby consented to a deferred judgment, but that trial court did not directly ask for defendant's consent to the deferred sentence subsequently imposed. In the questioning of defendant by his attorney prior to sentencing, however, the possibility of receiving a deferred sentence was raised three times and, in his responses, defendant indicated his willingness to cooperate in making restitution and to living within the terms of the probation agreement. He also indicated his understanding of the consequences of his failure to follow the terms of his probation. At no time during the interchange between defendant and his counsel did defendant object to the possibility of receiving a deferred sentence. Further, the presentence investigation

report recommended a deferred sentence, but defendant made no objection to this recommendation, nor did his counsel when asked if he had read, examined, and considered the report. In view of the record, we find that trial court reasonably could conclude defendant consented to a deferred sentence and that, therefore, no error occurred.

Having found no error in the issues raised by defendant, we affirm trial court's order for a deferred sentence.

AFFIRMED.