**IN THE COURT OF APPEALS OF IOWA**

No. 8-431 / 97-2358

**STATE OF IOWA,**
Appellee,

vs.

**HEIDI WAGNER,**
Appellant.

FILED
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CLERK SUPREME COURT

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Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

Heidi Wagner appeals the sentence imposed upon her guilty plea to possession of marijuana with intent to deliver in violation of Iowa Code section 124.401(1)(d) (1997). **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, John P. Sarcone, County Attorney, and John Courter, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Mahan, JJ.

**VOGEL, J.**

Heidi Wagner appeals the sentence imposed upon her guilty plea to possession of marijuana with intent to deliver in violation of Iowa Code section 124.401(1)(d) (1997). Wagner contends the district court abused its discretion in imposing a suspended sentence, as opposed to a deferred judgment. She also claims she was denied effective assistance of counsel. We affirm.

***I. Background.***

Heidi Wagner pleaded guilty to possession of marijuana with intent to deliver. The district court sentenced her to a suspended prison term not to exceed five years and placed her on two years probation.

***II. Scope of Review.***

We review sentences imposed by the district court for an abuse of discretion. *State v. Wright*, 340 N.W.2d 590, 592 (Iowa 1983). We will not disturb a sentence unless the court exercised its discretion on grounds that are clearly untenable or to an extent clearly unreasonable. *State v. Johnson*, 476 N.W.2d 330, 335 (Iowa 1992).

When a defendant claims ineffective assistance of counsel, we make our own evaluation of the totality of the circumstances, which is equivalent to a de novo review. *Kellogg v. State*, 288 N.W.2d 561, 563 (Iowa 1980). Our ultimate concern is the "fundamental fairness of the proceeding whose result is being challenged." *Origer v. State*, 495 N.W.2d 132, 135 (Iowa App. 1992) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed.2d 674 (1984)).

## *III. Discussion.*

### *A. Sentencing Discretion*

Wagner contends that, in ignoring substantial improvements in her life, the district court did not consider the "minimal essential factors" under Iowa Code section 907.5 (1997) in determining the sentence.[1] Wagner asserts she is currently attending college and close to obtaining her degree, is a dean's list student, has received awards and is fully employed. She maintains that she had limited involvement in the crime, does not have a prior criminal record, and will not be able to continue her education because a felony conviction will prevent her from qualifying for loans. With the trial court's denial of a deferred judgment, Wagner argues the court improperly focused on the amount ot marijuana seized rather than focusing on her positive qualities.

When exercising its discretion in sentencing:

> The trial court . . . should weigh and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of his reform. The courts owe a duty to the public as much as to defendant in determining a proper sentence. The punishment should fit both the crime and the individual.

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[1] The phrase "minimum essential factors" is not found in Iowa Code section 907.5. It was used in *State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979) to refer to factors a sentencing court is to consider when determining whether or not to defer judgment or suspend sentence. The "minimum essential factors" may be determined from such cases as *State v. Cupples*, 260 Iowa 1192, 1197, 152 N.W.2d 277, 280 (1967); *State v. Jackson*, 204 N.W.2d 915, 916 (Iowa 1973) (quoting from *In re Frazzita*, 147 N.Y.S.2d 11, 16-17 (Sup.Ct.1955)); *State v. McKeever*, 276 N.W.2d 385, 387 (Iowa 1979); *State v. Robbins*, 257 N.W.2d 63, 70 (Iowa 1977); *State v. Overstreet*, 243 N.W.2d 880, 887 (Iowa 1976); *State v. Warner*, 229 N.W.2d at 783; *State v. Banks*, 213 N.W.2d 483, 487 (Iowa 1973); *State v. Kendall*, 167 N.W.2d 909, 911 (Iowa 1969); and *State v. Thompson*, 275 N.W.2d 370, 371-72 (Iowa 1979).

*State v. Cupples*, 260 Iowa 1192, 1197, 152 N.W.2d 277, 280 (1967). Iowa Code section 907.5 sets forth the requirements the district court must meet before it can do other than pronounce judgment and sentence:

> 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.

*Id.* The record reveals the court considered the statements of counsel, Wagner's statements, the presentence investigation, the nature and gravity of the offense, Wagner's circumstances, and the effect of the sentence on Wagner in determining what, if any, sentence to impose. Adequate reasons in the record support the court's exercise of discretion. We determine the court did not abuse its discretion in imposing a suspended sentence instead of a deferred judgment.

*B. Ineffective Assistance of Counsel*

Wagner also contends that her trial counsel failed to present all the relevant information to the trial court for consideration of a deferred judgment. We disagree. A defendant has the burden of proving by a preponderance of the evidence trial counsel did not perform an essential duty and prejudice resulted. *State v. Howell*, 557 N.W.2d 908, 913 (Iowa App. 1996). To demonstrate prejudice a defendant must prove

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). In alleging ineffective assistance, a defendant must overcome the strong presumption counsel was competent. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994).

The court had before it information about Wagner's schooling, her awards, scholarships, the effect a conviction would have on obtaining loans, her employment, and her plans for future education. Although defense counsel may not have introduced every exhibit possible or elicited lengthy testimony from Wagner, we do not find counsel's actions fall outside the range of normal competence. Wagner has failed to overcome the strong presumption trial counsel acted competently.

**AFFIRMED.**