

IN THE COURT OF APPEALS OF IOWA

FILED

MAR 16 1989

CLERK SUPREME COURT

PAUL JOEL RAY,)
Applicant-Appellant,)
vs.)
STATE OF IOWA,)
Register-Appellee.)

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8-555
87-1812

Appeal from the Iowa District Court for Grundy County
(No. 55-187), Roger F. Peterson, Judge.

Defendant was denied his application for postconviction relief, and has appealed. **AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.**

Timothy M. Sweet, of Beard & Sweet, Reinbeck, for the applicant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; and Todd Greer, Assistant County Attorney, for the respondent-appellee.

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

OXBERGER, C.J.

Paul Ray was accused of a "crime spree" involving numerous crimes committed in four counties over a period of a few days. He entered guilty pleas to a charge of second-degree burglary in Grundy County and a charge of second-degree theft in Boone County. He was convicted and sentenced first on the Boone County theft charge, later on the Grundy County burglary charge. In imposing a sentence on the Grundy County burglary charge, the court used the same presentence investigation report prepared earlier for the Boone County court to use in connection with the theft charge.

Ray appeals the district court's denial of his application for postconviction relief. He contends he was denied due process because the State failed to make and preserve a verbatim record of the guilty plea and sentencing proceedings which are at issue in this appeal. Ray also contends his 1984 sentence for second-degree burglary cannot stand because the sentencing court used a presentence investigation report prepared in a different county for a different conviction.

Our scope of review is for errors at law. The trial court's findings are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We affirm in part and vacate the trial court's sentence and remand for resentencing in part.

First, Ray asserts he was denied due process in this postconviction relief proceeding because the State had failed to make and preserve verbatim record of the Grundy County guilty plea and sentencing proceedings. He argues because the State was unable to provide such a record for this postconviction proceeding, the postconviction court was unable to determine if there had been error in the guilty plea and sentencing proceedings. Ray urges that he should be entitled to resentencing and to plead anew. However, Ray did not file a motion in arrest of judgment and thus is not allowed to withdraw his guilty plea. Iowa R. Crim. P. 8(2)(d).

Courts in most jurisdictions agree that reconstruction of a transcript or other parts of the record should be allowed where the State has not been guilty of wrongful conduct or bad faith in connection with loss of the original records. McKnight v. State, 356 N.W.2d 532, 534 (Iowa 1984). Nothing in the evidence in this case suggests the State willfully or even negligently destroyed or misplaced the court reporter's notes. Both parties concede the shorthand reporter's notes for the hearing were lost and accordingly a transcript of the proceeding was not available. Under the authority of McKnight, we find reconstruction of the record through testimony to be proper. The testimony in this case establishes an adequate record of the plea proceeding. Accordingly, we fail to find the applicant was denied due process.

Second, Ray contends he has a statutory right to a presentence investigation report. He asserts he is entitled to a separate report from the Grundy court's conviction and that use of the Boone County report is not proper.

The State asserts because the two offenses at issue (the Boone County Class D theft offense and the Grundy County Class C burglary offense) were part of a "crime spree" and ultimately a plea negotiation, a separate presentence investigation report is not required.

Iowa Code section 901.2 provides that a presentence report shall be ordered when the offense is a Class B, C, or D felony. Iowa Code § 901.2 (1983). An amendment to this section provides that a presentence investigation report cannot be waived. See 1984 Acts, 70th G.A., ch. 1126, § 1 (effective 7/1/84). This amendment became effective July 1, 1984. Ray committed the crimes in question prior to July 1, 1984. However, his guilty plea proceeding and sentencing occurred after July 1, 1984.

The trial court noted the amended language cited above but concluded waiver was proper in this case because the language was added subsequent to the sentencing. We find error in the trial court's finding. Sentencing occurred on July 16, 1984. Therefore, the amendment to section 901.2 had become effective and a presentence investigation report was required and could not be waived.

The State also asserts as the crimes were part of a "crime spree," a presentence investigation report from one charge can be used for another. Iowa Code section 901.3 sets out the requirements for the contents of a presentence investigation report. Iowa Code § 901.3 (1983). While there would be many similarities between the two reports as they are both of the same defendant, the Code also requires specifics about the offense. Section 901.3(3) requires the circumstances of the offense. Iowa Code 901.3(3) (1983). Section 901.3(5) requires information concerning harm to the victim, the victim's immediate family and the community. Iowa Code § 901.3(5) (1983). The Boone County report did mention the Grundy County offense as pending and as a part of the plea bargain. However, the plea bargain did not specify what the sentence in the Grundy County case should be, only that any sentence should be concurrent with the Boone County case. The report also contained this language: "Victims include many businesses and private residences that were burglarized from a four county area: Boone, Hardin, Hancock and Grundy Counties." However, the specific description contains only information about the Boone County offense. Further, sources of information listed in the report relate to the Boone offense. We fail to find the presentence investigation report prepared for the Boone County offense may be used for sentencing for a Grundy County offense. The Boone

County report did not contain any recommendation by the investigator concerning the sentence in the Grundy County offense. Under the 1984 amendment to Iowa Code section 01.2 a presentence investigation report cannot be waived for Class B, C, and D felonies. Thus, we find the appellant was entitled to have a presentence investigation report prepared in conjunction with the Grundy County offense. We vacate the trial court's sentence and remand for preparation of an addendum presentence investigation report and resentencing. The addendum covers the specifics of the Grundy County crime and its effect on the victim to Grundy County. It should include the investigator recommendation regarding sentence of the Grundy County offense.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.