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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

485

STATE OF IOWA,)

Plaintiff-Appellee,) Filed January 29, 1985

vs.)

JAMES MILTON TERRY,) 4-568
84-1062

Defendant-Appellant.)

Appeal from the Iowa District Court for Wright County - David R. Hansen, Judge.

Defendant appeals the sentence imposed upon his conviction for failure to appear in connection with the charge of OWI, third offense, in violation of the provisions of Iowa Code section 811.2(7). VACATED AND REMANDED.

Charles Harrington, Appellate Defender, and Fern S. Shupeck, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Mickey W. Greene, Assistant Attorney General, for plaintiff-appellee.

Considered by Schlegel, P.J., Hayden, and Sackett, JJ.

Defendant appeals the sentence imposed upon his conviction for failure to appear in connection with the charge of OWI, third offense, in violation of the provisions of Iowa Code section 811.2(7). Defendant claims that the district court abused its discretion in ordering him to serve the sentence on the present conviction and the sentence previously imposed on the OWI conviction consecutively. He claims that the district court had a fixed policy of ordering consecutive sentences in all failure to appear charges.

At least in part by reason of a plea bargain—the State's agreement to withhold filing of habitual criminal charges—defendant pleaded guilty to failure to appear for sentencing on a felony, in violation of Iowa Code section 811.2(7). At sentencing, the court stated:

> . . . Well, your case raises a particular problem because the Court is obligated under the statutes of this state to impose on you a sentence that serves two purposes. The sentence must provide for the maximum opportunity for your rehabilitation, and the sentence must also provide for protection to society from further offenses by you and others.
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> * * *
>
> I'm not certain that Jim Terry needs a consecutive sentence for his own well-being. But I have every year hundreds of Jim Terrys who promise me that they will appear to be sentenced or who promise that they will appear for trial of their case. And the system has got to rely on those promises.
>
> Now, I tell each one of those people when they make that promise to me that if they fail to appear and that failure to appear is willful they run the risk of an additional sentence to be added consecutively to the sentence that they're given if they're found guilty of the offense they're charged with.
>
> Now, in order to make the system work that kind of penalty must be imposed. Because if defendants thought they had no real risk of any additional penalty if they didn't show up to be sentenced, the number who would show up to be sentenced in my judgment would be reduced substantially and we'd have to have a brigade of sheriffs around tracking down and chasing down people who didn't come in for court proceedings.

> So although I'm reasonably well convinced that Jim Terry doesn't need a consecutive sentence for his well-being . . . I am convinced that the other Jim Terrys out there need to know that consecutive sentences are imposed for willful failure to appear in court.

The sole question in this case is whether the sentencing court abused its discretion in ordering that the sentence imposed in this case be served consecutively with the sentence previously imposed upon this defendant for OWI, third offense.

The Iowa Supreme Court has established and consistently followed an abuse of discretion standard for reviewing a trial court's sentencing. "[S]o long as the sentence is within the statutory maximum we will not reverse absent an abuse of discretion." State v. Grgurich, 253 N.W.2d 605, 606 (Iowa 1977). This view was recently supported in our case of State v. Fink, 320 N.W.2d 632, 633 (Iowa Ct. App. 1982). In State v. Pappas, the supreme court elaborated further:

> An abuse of discretion is rarely found when sentence is imposed within the statutory maximum unless (1) the trial court fails to exercise its discretion, e.g., State v. Dvorsky, 322 N.W.2d 62, 67 (Iowa 1982) or (2) the trial court considers inappropriate matters in determining what sentence to impose, e.g., State v. Messer, 306 N.W.2d 731, 732-33 (Iowa 1981).

337 N.W.2d 490, 494 (Iowa 1983).

Similarly, the Iowa court adheres to the view that the trial court must actually apply discretion. Quoting State v. Cupples, 260 Iowa 1192, 1197, 152 N.W.2d 277, 280 (1967), the Iowa Supreme Court, in State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979), stated:

> The trial court and we on review 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 the defendant in determining a proper sentence. The punishment should fit both the crime and the individual.

In Hildebrand, the sentencing court had refused to grant a deferred sentence, stating: "I have the policy that when there is an accident involved, I do not and will not grant a deferred sentence .... But in exercise of my discretion, I maintain that when there is an accident involved, particularly an accident in which the defendant is clearly at fault, I do not believe it warrants a deferred sentence, and I will not grant a deferred sentence." Id. at 395. There, the supreme court held:

> In the case before us it is plain the sentencing court, instead of considering the minimal essential factors we consistently have identified, impermissibly selected only one—an attending circumstance—which triggered the court's previously-fixed sentencing policy. It is equally clear the court's personal, well-defined rule precluded the exercise of its discretion in rendering judgment.

Id. at 396. The court in Hildebrand cited the case of State v. Jackson, 204 N.W.2d 915, 916 (Iowa 1973), for the following proposition:

> There are many instances in which the Supreme Court and other courts are required to exercise discretion. Any such determination has long been recognized as requiring an actual exercise of judgment upon the part of the court. To do so necessitates a consideration by the court of the facts and circumstances which are necessary to make a sound, fair and just determination. The court is not permitted to arbitrarily establish a fixed policy to govern every case, as that is the exact antithesis of discretion.

280 N.W.2d at 396. The Hildebrand court also cited from State v. Robbins, 257 N.W.2d 63, 70 (Iowa 1977):

> The duty of a sentencing judge in every case is to consider the available options, to give due consideration to all circumstances in the particular case, and to exercise that option which will best accomplish justice both for society and for the individual defendant.

280 N.W.2d at 396.

Iowa Code section 901.8 (1983) provides for the imposition of consecutive sentences. That section provides, in pertinent part, as follows:

> 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.

That the Iowa Supreme Court permits the imposition of a sentence to commence at the expiration of a previous sentence appears from the case of State v. Van Klaveren, 208 Iowa 867, 872, 226 N.W. 81, 84 (1929). The imposition of consecutive sentences is discretionary with the trial court. See State v. Fink, 320 N.W.2d 632, 633 (Iowa Ct. App. 1982) (sentencing within the statutory limits will be set aside only for an abusive exercise of discretion on the part of the trial court).

We believe the trial court in this case, like the trial court in Hildebrand, followed a set policy in ordering the service of consecutive sentences. Although the court in this case did not explicitly state it was following a set policy--as was stated by the trial court in Hildebrand, 280 N.W.2d at 395—we believe the court had the following policy:

> One guilty of willful failure to appear for sentencing or trial under Iowa Code section 811.2(7) will be ordered to serve the sentence for that offense consecutively with the sentence imposed for the offense that was to be considered when the defendant failed to appear.

We reach this conclusion because we are unable to apprehend from the record any circumstances under which a person convicted of violating section 811.2(7) would not be sentenced to serve consecutive sentences. The legislature is empowered to mandate consecutive sentences for violation of section 811.2(7). See State v. Jackson, 204 N.W.2d 915, 916 (Iowa 1973). A judicial policy establishing such a penalty when the Code is silent on the issue, however, deprives judges of the discretion provided to them by statute. See id. Because the trial court acted pursuant to a fixed policy, the sentence imposed must be vacated. Hildebrand, 280 N.W.2d at 396-97.

This ruling is in no way to be interpreted that this defendant or any other defendant may not be appropriately ordered to serve two or more sentences consecutively, in the exercise of the discretion of the sentencing court. Such an order, simply on the basis of a set policy, regardless of the purity or desirability of the motive, cannot substitute for a sound discretion.

We vacate the order of the court requiring the sentence in this case to be served consecutively with the sentence on the OWI charge previously imposed, and remand this case to the trial court for resentencing in conformity with this opinion.

VACATED AND REMANDED.

Hayden, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I disagree with the majority's finding that the trial court had a set policy in ordering the service of consecutive sentences. I would affirm the trial court.