

IN THE COURT OF APPEALS OF IOWA

No. 9-121 / 98-864

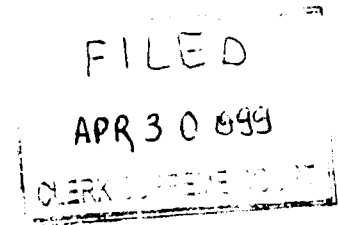
STATE OF IOWA,

Appellee,

vs.

JEFFREY MICHAEL PHILLIPS,

Appellant.



Appeal from the Iowa District Court for Story County, William J. Pattinson,
Judge.

Jeffrey Michael Phillips appeals his convictions for domestic abuse assault,
assault and going armed with intent. **AFFIRMED AND REMANDED.**

Jason P. Happel, Ames, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney
General, Mary E. Richards, County Attorney, and Daniel Gonnerman, Assistant
County Attorney, for appellee.

Considered by Vogel, P.J., Zimmer, J., and Peterson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

PETERSON, S.J.

Jeffrey Phillips appeals the sentences on his convictions for domestic abuse assault, assault, and going armed with intent. He argues his sentence for going armed with intent was outside the statutory limits. He also contends the sentencing court abused its discretion. We affirm and remand.

On December 16, 1997, Phillips went out for drinks with his ex-wife Patty. They got into an argument and Phillips went to his home. He returned to Patty's home later and found her in bed with another man, Robert. Phillips assaulted Patty and Robert with his fists. He then walked out on the porch, and saw a baseball bat. Phillips walked back into the bedroom with the intention of hitting Robert with the bat. Robert begged Phillips not to hit him. Phillips stated he came to his senses and left.

Phillips was charged with the following crimes: Count I, burglary in the first degree; Count II, aggravated domestic abuse assault; Count III, criminal mischief in the fourth degree, Count IV, aggravated assault; and Count V, going armed with intent.¹

Pursuant to a plea agreement, on March 30, 1998, Phillips pled guilty to domestic assault, a simple misdemeanor, in violation of Iowa Code section 708A.2(a); assault, a serious misdemeanor, in violation of sections 708.1(1) and 708.2(2); and

¹ We note the trial information did not follow the suggested form (Form 8) found in the appendix to Iowa Rule of Criminal Procedure 31, in which the corresponding code section follows immediately after the crime charged. Here, the trial information listed the crimes allegedly committed, and then separately listed all of the code sections involved.

going armed with intent, a class D felony, in violation of section 708.8. The other charges against Phillips were dismissed.

The district court sentenced Phillips to thirty days in the county jail, with all but fifteen days suspended, on the charge of domestic assault. Phillips was sentenced to 365 days in the county jail, all but thirty-six days to be suspended, on the charge of assault. These sentences were made consecutive. He was sentenced to a term of imprisonment not to exceed five years on the charge of going armed with intent. This sentence was suspended and Phillips was placed on probation for two years. As conditions of probation, Phillips was ordered to attend a batterer's education program, undergo a substance abuse evaluation, abstain from using alcohol, and complete an anger management class. Phillips now appeals his sentences.

I. When a sentence falls within statutory limits it will only be set aside for an abuse of discretion. *State v. Mai*, 572 N.W.2d 168, 170 (Iowa App. 1997). An abuse of discretion is found only when the sentencing court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Privitt*, 571 N.W.2d 484, 486 (Iowa 1997).

II. During the sentencing hearing, and in the judgment entry, the district court referred to the crime of going armed with intent as being in violation of sections 716.1 and 716.6. These code sections actually refer to the crime of criminal mischief. The crime of going armed with intent is found in section 708.8.

As noted above, going armed with intent is a class D felony, and Phillips was sentenced to a term of incarceration not to exceed five years, suspended, for this

crime. He contends he should have been sentenced for a serious misdemeanor, pursuant to sections 716.1 and 716.6, because these were the code sections cited by the district court. Phillips asserts his sentence is outside the statutory limits of the code sections used by the court.

We find the reference to sections 716.1 and 716.6 were a clerical error. It is clear defendant pled guilty to going armed with intent, in violation of section 708.8. In the plea proceedings the court discussed the elements of going armed with intent and questioned Phillips about each element. The court also pointed out that defendant was pleading guilty to a class D felony. Phillips' sentence was not outside the statutory limits of the crime to which he pled guilty.

We determine the matter should be remanded to the district court to allow it to issue a nunc pro tunc order to correct the clerical error in the judgment entry.

III. Phillips claims the district court abused its discretion by improperly considering a higher crime, which he had not committed, at the time of sentencing. During the sentencing hearing, the court stated:

You're -- honestly, you're really pretty lucky here you're not being sentenced today for two counts of second degree murder. You can't pick up The Des Moines Register anymore without seeing an article on someone goes in and kills a spouse or his girlfriend and the kids and kills himself or ends up being arrested and tried. That's all too commonplace news story anymore.

Defendant asserts these statements show his sentence was more severe based on the court's consideration of the crime of second-degree murder.

A sentencing court may impose a severe sentence for a crime if the facts show the defendant actually committed a higher crime. *State v. Thompson*, 275 N.W.2d 370, 372 (Iowa 1979). There is no evidence to show Phillips committed the crime of second-degree murder, or that the court believed he had committed this crime. No one died as a result of the crime. The court was merely stating defendant was lucky the violence had not escalated until someone had died. The statement was a special commentary, not a reflection of a crime committed. The sentence in this case was not more severe based on a belief defendant had committed a higher crime.

IV. Phillips also claims the district court abused its discretion by failing to articulate adequate reasons for imposing its sentence. He contends the district court improperly considered only the nature of the offense at the time of sentencing. A court may not consider the nature of the offense alone in determining a discretionary sentence. *State v. Dvorsky*, 322 N.W.2d 62, 67 (Iowa 1982).

In the judgment order, the court stated it considered the presentence investigation report, together with defendant's testimony, his prior criminal record and other factors. Obviously the court did not only consider the nature of the offense. At the sentencing hearing, the court stated:

I think under the circumstances that we have in this case, the level of violence, the manner that it occurred, I don't think I can, in good conscience, walk out of here having assessed only six or eight days worth of time and credit for time served. That situation and society demand more.

We conclude the court gave adequate reasons for the sentence imposed.

We affirm defendant's convictions and sentences. However, we remand the case to allow the district court to issue a nunc pro tunc order to correct the clerical error in the judgment entry.

AFFIRMED AND REMANDED.

No. 98-864. [9-121] STATE v. PHILLIPS

Appeal from the Iowa District Court for Story County, William J. Pattinson, Judge. **AFFIRMED AND REMANDED.** Considered by Vogel, P.J., Zimmer, J., and Peterson, S.J. Opinion by Peterson, S.J. (6 pages \$2.40)

Jeffrey Phillips found his ex-wife Patty in bed with another man, Robert. Phillips beat Patty and Robert with his fists. He then got a baseball bat with the intention to hit Robert with the bat. Phillips stated he then came to his senses and left. Phillips pled guilty to domestic assault, in violation of Iowa Code section 708A.2(a); assault, in violation of sections 708.1(1) and 708.2(2); and going armed with intent, in violation of section 708.8. Phillips was sentenced to some time in the county jail on the domestic assault and assault charges. On the charge of going armed with intent, he was given a suspended sentence and placed on probation. Phillips now appeals his sentences. **OPINION HOLDS: I.** During the sentencing hearing, and in the judgment entry, the district court referred to the crime of going armed with intent as being in violation of sections 716.1 and 716.6. The crime of going armed with intent is actually found in section 708.8. We find the references to sections 716.1 and 716.6 were a clerical error. It is clear defendant pled guilty to going armed with intent, in violation of section 708.8. We determine the matter should be remanded to the district court to

allow it to issue a nunc pro tunc order to correct the clerical error in the judgment entry. **II.** Phillips claims the district court abused its discretion by improperly considering a higher crime which he had not committed, second-degree murder, at the time of sentencing. There is no evidence to show Phillips committed the crime of second-degree murder, or that the court believed he had committed this crime. The court's statement was a special commentary, not a reflection of the crime committed. **III.** Phillips also claims the district court abused its discretion by failing to articulate adequate reasons for imposing its sentence. In the judgment order, the court stated it considered the presentence investigation report, together with defendant's testimony, his prior criminal record, and other factors. Obviously the court did not only consider the nature of the offense. The court gave adequate reasons for the sentence imposed. We affirm defendant's convictions and sentences. However, we remand the case to allow the district court to issue a nunc pro tunc order to correct the clerical error in the judgment entry.