

FILED

APR 24 1984

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

369

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed April 24, 1984

vs.

)

MARLIN DAVID WEICHT,

)

4-25
83-718

Defendant-Appellant.

)

Appeal from the Iowa District Court for Marion County - M. C. Herrick,
Judge.

Defendant appeals his sentence imposed following his guilty plea conviction
for second-degree burglary and operating while intoxicated in violation of Iowa
Code sections 713.5 and 321.281 respectively. **AFFIRMED.**

Richard A. Bartolomei, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General, and Lona Hansen, Assistant Attorney
General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Snell, JJ.

Defendant appeals his sentence imposed following his guilty plea conviction for second-degree burglary and operating while intoxicated in violation of Iowa Code sections 713.5 and 321.281 respectively. He claims that sentencing was improperly based on consideration of a single factor and was improperly considered circumstances relating to separate and unproven offenses. We affirm.

Defendant pled guilty to charges of attempted murder, terrorism, and going armed with intent but was later permitted to withdraw his plea. After further proceedings defendant pled guilty to a charge of burglary in the second degree and an unrelated charge of operating while intoxicated and the State agreed to dismiss weapons-related charges (willful injury, terrorism, and going armed with intent) and another charge of operating while intoxicated. At sentencing, the State presented evidence showing that the incident leading to the burglary charge involved defendant's use of a pellet gun, threats directed against his ex-wife and her boyfriend, and injury of the boyfriend. Defendant was sentenced to an indeterminate ten-year prison term on the burglary charge and a concurrent two-year term on the operating charge, stating its reasons as follows:

The Court has considered possibility of probation, but in view of the surrounding circumstances connected with the offense on August 16th, 1982, the fact that you discharged a weapon several times deliberately at other persons and did cause injury to at least one other person, Mr. Skip Dugger, the Court takes the position this is too serious an offense to permit probation and the Court has to take into consideration the protection of the public and the example to other persons who might engage in violent behavior and I think that any time that a person uses a dangerous weapon in this way they should be committed to prison.

Defendant brought this appeal, challenging his sentence in two ways.

I.

Defendant first claims that the sentencing court improperly based its sentence on one factor indicating a previously-fixed sentencing policy. This relates to the court's statement "I think that any time that a person uses a

dangerous weapon in this way they should be committed to prison." It is, of course, true that a court's sentencing discretion must be exercised "without application of a personal, inflexible policy relating to only one consideration." State v. Hildebrand, 280 N.W.2d 393, 397 (Iowa 1979).

We believe the court properly exercised its discretion. It is clear from the court's entire statement that its sentencing decision was based on a number of factors including the nature of the offense and its consequences (i.e., injury to Skip Dugger), the seriousness of the offense with respect to the propriety of probation, and the need for protection of the public and for an example to others who might tend to violent behavior. The challenged statement by the court was merely its conclusion that, considering all of these factors surrounding his use of a pellet gun "in this way," the sentence chosen was in fact appropriate in this case. Defendant's contention that the court's decision was based only on the use of this weapon ignores the remainder of the court's rationale. This issue has no merit.

II.

Defendant also claims that the court erred in basing its decision on circumstances relating to separate and unproven offenses, i.e., the weapons-related charges which were dismissed pursuant to the plea bargain. We disagree. The statutory definition of burglary includes the requirement to prove an intent on defendant's part to commit an assault, felony, or theft. Iowa Code § 713.1. The court was therefore required to ascertain any and all relevant facts relating to this defendant's intent in committing the burglary. See State v. Banks, 213 N.W.2d 483, 486 (Iowa 1973). According to the record made at the sentencing hearing, the circumstances of this case are that defendant entered his ex-wife's apartment with a loaded shotgun to await her and her boyfriend. At the least, his intent was to assault them; at the most, it was to murder them and kill himself. He threatened to kill them and himself. He shot at his ex-wife and her boyfriend as they fled, injuring the boyfriend. We believe it is clear that the court considered

these facts as brought out in the sentencing hearing as they related to defendant's intent in committing the burglary for which he pleaded guilty. Thus the court was entitled and indeed obligated to do. See id.

The court below did not abuse its discretion in sentencing defendant as it did. We therefore affirm.

AFFIRMED.