IN THE COURT OF APPEALS OF IOWA

No. 8-583 / 98-146

STATE OF IOWA,

Appellee,

vs.

DESHAWN RICARDO OLIVER,

Appellant.

FILED
FEB 24 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, K.D. Briner, Judge.

Deshawn Oliver appeals the judgment and sentence entered upon his conviction of multiple counts of forgery and one count of first-degree theft following guilty pleas. **AFFIRMED.**

Katherine Spencer of the Law Offices of Ta-Yu Yang, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Shawn Wehde, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., Huitink, J., and Peterson, S.J.*

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

PETERSON, S.J.

The defendant Deshawn Ricardo Oliver appeals the judgment and sentence that was entered by the court after his guilty pleas to multiple counts of forgery and one count of first-degree theft. He contends that the district court failed to exercise its discretion and abused its discretion in imposing a sentence by relying upon findings not supported by the record. He also contends that he received ineffective assistance of counsel.

Background and Proceedings.

In January of 1997, the defendant was charged in cause No. FECR 068534 with six counts of forgery contrary to section 715A.2 of the Code of Iowa (1995). In April of 1997 he was charged in cause No. FECR 070036 with one count of forgery contrary to section 715A.2 of the Code of Iowa.

On August 22, 1997 the defendant appeared before the court and entered a plea of guilty to six counts of forgery in cause No. FECR 068534 and a single cause of forgery in case No. FECR 070036. The pleas were based on an agreement between the State and defendant. The agreement covered not only the charges before the court but also some other charges which had not been filed. All of the charges involved sentences of five years. Under the agreement, the total sentence would be for fifteen years. It would require some of the sentences to be consecutive and some to be concurrent. It was further agreed that the State would not request the defendant be placed in custody pending sentencing. Any additional charges that may accrue after the plea, or if the defendant failed to appear for sentencing, the agreement would be

null and void. The trial court then proceeded with the guilty pleas to the charges and agreed to be bound by the agreement.

In November of 1997 the defendant was charged in cause No. FECR 074355 with the crime of theft in the first-degree contrary to sections 714.2(1) and 714.1(1) or 714.1(4) of the Code of Iowa (1995). It was alleged that this offense occurred between September 19, 1997 and October 9, 1997. In December of 1997 the defendant was charged in cause No. FECR 075717 with two counts of forgery contrary to section 715A.2 of the Code of Iowa (1995). It was alleged that these two incidents occurred on May 23, 1997. Also in December the defendant was charged in cause No. FECR 075718 with two counts of forgery contrary to section 715A.2 and one count of forgery by a credit card contrary to section 715A.6 of the Code of Iowa (1995).

The defendant appeared before the court on December 17, 1997. A second plea agreement had been reached by the State and the defendant. The defendant would plead guilty to the charge of theft in the first-degree in cause No. FECR 074355 and two counts of forgery in case No. FECR 75718 and count three of that case which was forgery by a credit card would be dismissed. Defendant would not resist incarceration and that the sentence imposed in these cases would be consecutive or concurrent so that they would add up to a total sentence of not to exceed twenty years. The State also agreed not to file any additional charges and the defendant would not request a reconsideration of the sentences.

The plea agreement that was entered into by the parties when the defendant pled guilty to the six counts of forgery in cause No. FECR 068534 and one count of forgery in cause No. FECR 070036 was withdrawn because the defendant had failed to appear for sentencing and had been charged with the crime of theft in the first-degree which occurred while he was awaiting sentence on the forgery charges.

The defendant decided to plead guilty to the additional charges, but wanted to argue about the extent of the sentence, instead of being bound by the agreement. He realized that this would open him up to further proceedings on other cases that the State was aware of.

The defendant then entered a plea of guilty to the charge of theft in the first degree in cause No. FECR 074355 and two counts of forgery in cause No. FECR 075717 and two counts of forgery in cause No. FECR 075718. The State moved to dismiss count three of cause No. FECR 075718 without prejudice, which was granted.

The matter then proceeded to sentencing. The defendant was sentenced to ten years on the charge of theft in the first-degree in cause No. FECR 074355. He was then sentenced to five years on each count of forgery in cause No. FECR 075717. Count one was to run consecutive to the sentence in cause No. FECR 074355 and count two was to run consecutive to count one.

In cause No. FECR 075718 the defendant was sentenced to a period of five years on each of the two counts. These two counts would be concurrent with the sentence in cause No. FECR 074355. In cause No. FECR 070036 the defendant was sentenced to serve five years on his forgery charge and this was to run concurrent

with the sentence in cause No. FECR 074355. In cause No. FECR 068534 the defendant was sentenced to serve a period of five years on each count of the six cases of forgery and each count would run concurrent with the other count and concurrent with the sentence imposed in No. FECR 074355. A total sentence imposed on the defendant was twenty years. The trial judge then said to the defendant:

> Mr. Oliver, I am required to tell you the reasons for the sentence that I have found to be appropriate. If I were looking only at the record that you committed forgery in December of 1996 or even several forgeries at that time, I would be receptive to the argument that you are essentially a first offender because you do not have a significant previous adult criminal record. That's not what I am looking at here. I am looking at a record that you committed forgeries in February and March, that you committed forgeries in May, that you committed theft of an auto in September and October, at which point that's not the report of a first offender but of somebody who has somehow gotten into the position of making a decision that significant criminal acts are the only way to make the pieces fit. I am being very polite about that. I don't speak with disrespect. The real name is being a career criminal.
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> I am going to sentence you to sentences which add up to 20 years and I am going to tell you in an odd sort of way I am doing this in part because of the plea agreement. I can't un-ring the bell and go back and not know what that agreement was, but I can tell you if you had pled to these offenses without that agreement, I would have sentenced you to 30 years. I would run those six forgeries consecutive and everything else concurrent with them. Your lawyer and the State's lawyer are both known to me as good lawyers who are skillful and experienced and they know a lot more about these cases than I was going to find out in an hour this morning. If they thought this was a fair sentence, in my judgment that would have been an appropriate sentence.
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> I believe what you said this morning about being sorry. You said something that rang true in my ear. You said "I'm sorry" isn't going to help my mother and my wife right now and my son. And I guess that's true, isn't it? One of the difficult things about being an adult is that we all learn as kids sometimes if you say you are sorry, it goes away. A part of being an adult is understanding there is nobody who can make it go away anymore. We answer for our acts.

In the sentencing order, the court noted a pre-sentence investigation report was prepared and was used by the court in sentencing the defendant in all the cases. This order also noted that "The court has considered the defendant's age, prior record, present circumstances; statements and arguments of counsel; recommendations of presentence investigation report; and any additional reason stated on the record."

The pre-sentence investigation establishes the defendant was twenty-five years of age and had attended college for three years. He had been referred to the juvenile court services as a result of a charge of theft in the first-degree in 1990. He was also convicted of the crime of habitual offender in that year. In 1991 he was charged with aiding and abetting and received a ten-day suspended sentence with one year of self probation. In January of 1996 he was charged with driving while his license was suspended and was sentenced to serve two days which was suspended and placed on probation for twelve months and fined $250 dollars.

The pre-sentence report recommended that the defendant be sentenced to serve seven five-year prison terms for the seven counts of forgery. The State had recommended a combination sentence of twenty years and the defendant's attorney had recommended a combination sentence of ten years and that the sentence be suspended that he be placed in the residential treatment facility.

Scope of Review

The scope of review for defects in a sentencing procedure is for correction of errors at law. *State v. Thomas,* 547 N.W.2d 223, 225 (Iowa 1996); Iowa R. App. P. 4. A sentence will be overturned only for an abuse of discretion. *Id.* at 225.

Sentencing decisions of the trial court are cloaked with a strong presumption in their favor, and an abuse of discretion will not be found unless the defendant shows that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Loyd*, 530 N.W.2d 707, 713 (Iowa 1995). A sentencing court's statement of its reasons satisfies the rule if it recites reasons sufficient to demonstrate the exercise of discretion and indicates those concerns which motivated the court to select the sentence which it imposed. *See State v. Garrow*, 480 N.W.2d 256, 259 (Iowa 1992); *State v. Johnson*, 445 N.W.2d 337, 342-43 (Iowa 1989); *State v. Victor*, 310 N.W.2d 201, 205, (Iowa 1981).

Sentencing

The defendant initially contends that the trial court did not exercise its discretion and simply deferred to the assistant county attorney's proposed plea agreement.

At the time of sentencing the trial court told the defendant that it was considering the number of crimes that the defendant had committed and the period of time in which they were committed, his apology to his family and acceptance of responsibility for his acts. The information in the pre-sentence report and the recommendations of counsel were also considered. We believe the matters the court took into consideration support the conclusion that the trial court exercised its discretion in arriving at the sentence imposed upon the defendant.

The defendant contends that the trial court abused its discretion by relying on facts not supported by the record. It is his contention that the court found him to be a "career criminal."

We believe this comment was only the courts' characterization of the attitude the defendant had shown by these acts. It was not a finding of a fact outside of the record.

Ineffective Assistance of Counsel

The defendant contends that he received ineffective assistance of counsel. He claims that his counsel failed to pursue a viable defense in connection with the theft in the first-degree in cause No. FECR 074355, and that he was prejudiced because of his ill advised guilty plea to the charge of theft in the first-degree which was relied upon heavily at the time of sentencing by the trial court. He believes he should have insisted on going to trial.

Generally, in situations of appeal where ineffective assistance of counsel is alleged these matters are reserved for post-conviction proceedings. *State v. Buck,* 510 N.W.2d 850, 853 (Iowa 1994). However, they will be resolved on direct appeal when the record adequately presents the issues. *Id.* We have reviewed the record in this case and conclude that it is insufficient to resolve the claim of ineffective assistance of counsel on direct appeal and accordingly preserve both claims for further post-conviction proceedings.

In conclusion we find that the trial court exercised its discretion in sentencing the defendant and that it did not consider matters not supported by the record. We

reserve for post-conviction proceedings the defendant's claim of ineffective assistance of counsel.

AFFIRMED.