

IN THE COURT OF APPEALS OF IOWA

No. 3-1016 / 13-0442
Filed December 5, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN PHILLIP DEAN KENDALL,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Paul L. Macek,
Judge.

John Kendall appeals from his consecutive sentences for two counts of sexual abuse in the third degree and one count of lascivious acts with a child.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Maria Ruthenberg,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Triick, Assistant Attorney
General, Michael J. Walton, County Attorney, and Melisa Zaehring, Assistant
County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Danilson, JJ.

POTTERFIELD, J.

John Kendall appeals from his sentence for two counts of sexual abuse in the third degree and one count of lascivious acts with a child. He argues his counsel was ineffective in failing to object to the presentence investigation and the district court abused its discretion in imposing his sentence. We affirm, finding Kendall was provided effective assistance and the court did not abuse its discretion in imposing his sentence.

I. Facts and proceedings.

John Kendall pleaded guilty to two counts of sexual abuse in the third degree and one count of lascivious acts with a child pursuant to a plea agreement. Sentencing was held January 31, 2013. The State requested the court impose a sentence of thirty years of incarceration because each charge involved a separate victim, the crimes were committed while Kendall was on probation, and he had previously been granted the services of community-based programs but nothing changed his behavior. Kendall's counsel argued concurrent sentences were appropriate given Kendall's age and his lack of a previous imprisonment, he was the victim of sexual abuse, and he had not received the structure and assistance necessary to address his mental health and substance abuse problems. A victim's mother also testified at the sentencing hearing. The court was provided with a presentence investigation report, which it considered in sentencing. Kendall was provided with a copy of the report, and when asked whether there were any additions or corrections to the report, his counsel replied there were not.

Kendall was sentenced to ten years on each count, to be served consecutively. In making its decision, the court stated:

Mr. Kendall, it is my duty under the law to review what is available to me in terms of community resources and to determine what the appropriate rehabilitative plan for you would be, and to also consider that the public must be protected. In doing so, I am looking at the seriousness of the crime, the effect that this crime has had upon members of the community, and what is available to the—in this community to assist you in this process.

. . . .

Mr. Kendall, you were on probation while these crimes were occurring. . . . The proposition that they occurred while you were on probation and knew that you should have been minding your Ps and Qs and doing everything that you were supposed to do according to the law weighs heavily on the Court's mind.

. . . .

Again, because you were on probation, again because you had three separate victims, to protect the community from such predations, it is the sentence of this Court that these sentences will run consecutively.

Another reason for the consecutive sentence is that prison will provide you with the maximum opportunity for rehabilitation. Another reason is to punish you. Yet another reason is both specific and general deterrence. These crimes are abhorrent.

Kendall appeals from the sentencing proceedings.

II. Analysis.

We review claims of ineffective assistance of counsel *de novo*. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). We review a court's sentencing for the abuse of discretion. *State v. Leckington*, 713 N.W.2d 208, 216 (Iowa 2006); *State v. Phillips*, 561 N.W.2d 355, 357 (Iowa 1997).

A. Ineffective assistance of counsel.

Kendall first argues his counsel was ineffective for failing to object to the presentence investigation report. The report, he contends, should have contained "resources available for [Kendall] to address [his mental health and

substance abuse] issues” and current treatment information. Counsel erred in failing to “object to the incomplete PSI and [failing to request] that the court continue the hearing until all of the information was available.”

In order to show ineffective assistance of counsel, Kendall must show both that counsel committed an unprofessional error and that because of that error, he was prejudiced. *Straw*, 709 N.W.2d at 133. The court was made aware of previous unsuccessful attempts at rehabilitation of Kendall. Kendall’s counsel and the PSI mentioned Kendall’s substance abuse and mental health issues. Further, the PSI detailed Kendall’s admitted substance abuse problems and his prior treatment at the center for alcohol and drug services in 2011 and 2012. He was successfully discharged from both programs. The PSI also included a record of his substance abuse meetings with state treatment institutions and his other intervention needs, recommended the Iowa Department of Corrections as the only further community resource, detailed his mental health medication, listed his other dependencies, and contained Kendall’s personal comments on his emotional and personal health.

Kendall provides no argument as to what other details could have been provided by even more records; the court specifically considered that he had unsuccessfully received prior services and that he was on probation at the time he committed these crimes, and it concluded consecutive sentences were appropriate. Kendall was not prejudiced by his counsel’s failure to object to the PSI.

B. Sentencing.

Kendall next argues the district court erred by “failing to consider mitigating circumstances, relying on an incomplete presentence investigation report, and by imposing consecutive sentences.”

A sentencing court has a duty to consider all the circumstances of a particular case. We do not believe however, it is required to specifically acknowledge each claim of mitigation urged by a defendant. Furthermore, the failure to acknowledge a particular sentencing circumstance does not necessarily mean it was not considered. Instead, we review a sentence for an abuse of discretion based on the entire record, and look to see if the reasons articulated by the trial court are sufficient to enable us to determine if an abuse of discretion occurred.

State v. Boltz, 542 N.W.2d 9, 11 (Iowa Ct. App. 1995) (internal citations omitted).

The PSI, the State, and Kendall’s counsel all brought to the court’s attention Kendall’s mental health and substance abuse problems. The court specifically noted it was considering the entire PSI, which contained detailed information on these issues. We find, based upon the entire record, the district court did not abuse its discretion in failing to expressly note on the record Kendall’s mental health and substance abuse issues as mitigating circumstances.

Next, we consider Kendall’s complaint regarding the sufficiency of the PSI. In *State v. Phillips*, our supreme court denied a request to vacate a sentence and remand for resentencing where the court was not provided with information on one of the factors required under our PSI statute, concluding, “We do not believe that the lack of formal information regarding one factor out of the six enumerated in Iowa Code section 901.3 renders the sentencing procedure deficient under the facts in this case, especially since the court had the benefit of substantially equivalent information.” *Phillips*, 561 N.W.2d at 358–59. Under our code, if a

defendant has a history of mental health issues or substance abuse, “the investigator shall inquire into the treatment options available in both the community of the defendant and the correctional system.” Iowa Code § 901.3 (2013). The court was provided substantial information here: details of Kendall’s history of treatment by state institutions were provided in the PSI; ultimately placement with the department of corrections was recommended as the only further community resource available. We find reversal and resentencing are not warranted. See *Phillips*, 561 N.W.2d at 359.

Finally, we consider whether the district court erred in imposing consecutive sentences. “We review a district court’s decision to impose consecutive sentences for abuse of discretion. An abuse of discretion will only be found when a court acts on grounds clearly untenable or to an extent clearly unreasonable.” *Leckington*, 713 N.W.2d at 216 (internal citations omitted). The court detailed multiple factors when making its sentencing determination, including the number of victims, that the crimes were committed while Kendall was on probation, the seriousness of the crimes, the protection of the community, and Kendall’s chances for rehabilitation. We find no abuse of discretion in the district court’s decision to have Kendall serve his sentences consecutively.

AFFIRMED.