IN THE COURT OF APPEALS OF IOWA

No. 3-933 / 12-1939
Filed November 6, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LEVI I. SWANSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, John G. Linn, Judge.

Defendant appeals the sentence imposed upon his conviction for vehicular homicide, in violation of Iowa Code section 707.6A(2) (2011). **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Patrick J. Jackson, County Attorney, and Tyron Rogers, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

Levi Swanson appeals the sentence imposed upon his conviction for vehicular homicide, in violation of Iowa Code section 707.6A(2) (2011). On appeal, he contends the district court abused its discretion by imposing incarceration for a term not to exceed ten years and failed to provide adequate reasoning for imposing consecutive sentences. He asks that we vacate his sentence and remand for resentencing. Because the sentencing court considered proper factors, did not employ a fixed sentencing policy, and gave adequate reasons for imposing consecutive sentences, we affirm.

I. Background Facts and Proceedings.

On March 23, 2012, a concerned citizen called dispatch to warn that she had witnessed an erratic driver on the road. The citizen provided a description of the car as well as the license plate number. Louisa County Deputy Sheriff Rick Cook received a call from dispatch about the driver. He then began searching for the car that had been reported. He found it and began to follow. Deputy Sheriff Cook observed two figures in the front seat of the vehicle. He saw the passenger moving around in such a way that indicated to him that the passenger was attempting to hide something in the vehicle. Cook then decided to stop the vehicle for an investigatory search.

The deputy sheriff activated his overhead red and blue flashing lights. The vehicle did not stop, so he then activated his siren. Cook also honked the car's horn in an attempt to get the driver's attention. Because the vehicle still did not stop, the deputy sheriff decided to pull alongside the moving vehicle to

ensure the driver saw his patrol vehicle. As he switched lanes to do so, the car accelerated. Deputy Sheriff Cook then radioed dispatch, alerting that the car was not yielding and he was in pursuit.

Cook testified he reached a speed of 120 miles per hour while in pursuit of the vehicle. The vehicle in question still eluded him. Cook lost sight of the vehicle as it rounded a corner that led to a straightaway into Mediapolis.

Deputy Sheriff Cook did not see the vehicle again until he drove through the town of Mediapolis. He found it crashed into a tree in front of a house. The driver's side was up in the tree, and the passenger side was lower to the ground. It took approximately forty-five minutes after back-up and medical personnel arrived to remove the occupants from the vehicle. The passenger, Kylan Burrell, was pronounced dead at the scene. An officer assisting with the technical collision investigation estimated the car was traveling ninety miles per hour at the time of the accident. In contrast, the speed limit on the portion of road was thirty-five miles per hour.

The driver, Swanson, was charged with vehicular homicide, in violation of Iowa Code section 707.6A(2). A jury trial commenced on September 11, 2012, and Swanson was found guilty as charged.

The sentencing hearing took place on October 22, 2012. The State recommended Swanson be incarcerated and sentenced to a ten-year term of imprisonment. The State also recommended his sentence run consecutively to his previously suspended sentence for theft in the second degree. During the hearing, the court stated:

In this case, the court has carefully reviewed the presentence investigation [report]. I've taken into consideration the comments of the attorneys, the defendant's comments. I read through a second time the victim impact statement, and, of course, I presided over the jury trial, so I'm well aware of the facts.

In this case, a few factors would justify mitigation. Many factors, however, would justify confinement.

Those factors which the court takes into consideration in mitigation are as follows: This defendant conducted himself relatively well while on probation until this crime was committed.

In addition, it's my assessment that the defendant has at least a mediocre work record. I don't think I'm as harsh as the State in analyzing Mr. Swanson's work record. It's not too bad.

The court would note the defendant has earned his GED, and he has some family ties to Southeast Iowa; he has siblings, a wife and a daughter and a stepson.

Those factors which would justify confinement and a more harsh sentence are as follows: The facts and circumstances of this crime are particularly serious. This is really a crime against a person. It was not an accident. It was an intentional act in not stopping for the police officer. You didn't intentionally cause the death of your best friend, but if you had done what a lawful citizen should have done, your friend, Kylan Burrell, would not be dead today, and he is.

The court would note that this defendant is no longer a youthful offender. He's 23 years old. That may seem young to some people, but a person who's 18 or 19 might act impulsively, and the court gives them a second chance like you got in the theft case, but at your age, now you have to act more responsibly. Impulsive acts can lead to serious consequences.

The court would note that the defendant owes a substantial amount of money to the judicial branch already. This is not a particularly important factor, but what it indicates to the court is that a fine will not deter the defendant.

The court would note that the defendant has a substance abuse problem. To his credit, he recognizes and admits it.

The court would note the probation office recommends confinement.

And, finally, the defendant has a lengthy record of criminal convictions. He has quite a few adjudications in juvenile court and then in adult court. He has been found guilty or pled guilty to numerous offenses; most are misdemeanors, many repeat offenses, which indicates a lawlessness on behalf of the defendant. I would note that he's driving while barred, which indicates that this defendant is not safe to operate a motor vehicle, yet he continues to do so. He was convicted of burglary in 2008, received a

> suspended sentence and probation, and yet there was a probation violation complaint filed. He was convicted of a felony and was on probation when this crime was committed.
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> In balancing these factors, Mr. Swanson, the court concludes that confinement is the just sentence. It may not be the sentence you want, nor it may not be the sentence anybody in this courtroom wants, but as a judge, I have to consider what will deter you and what will deter people in the State of Iowa to keep this crime from happening again. It's my conclusion that confinement is the appropriate outcome, and that the sentence should run consecutive to the sentence in FECR5410.[1]

Swanson appeals.

II. Standard of Review.

Our review is for correction of errors at law. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). The decision to impose a sentence within statutory limits is "cloaked with a strong presumption in its favor." *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). Absent an abuse of discretion or defect in the sentencing procedure, the sentence imposed by the district court will not be disturbed. *Id.* 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. *Thomas*, 547 N.W.2d at 225. We review both the court's stated reasons made at the sentencing hearing and its written sentencing order. *See State v. Lumadue*, 622 N.W.2d 302, 304 (Iowa 2001).

III. Discussion.

On appeal, Swanson maintains the district court abused its discretion in sentencing him to a term of imprisonment not to exceed ten years and erred in

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[1] This case involved a five-year sentence for theft in the second degree from 2008, previously suspended while Swanson was on probation.

failing to state its reasons for ordering the sentence to be served consecutively to a previous sentence.

A. Defendant's Age.

Swanson first contends the court abused its discretion by determining his age at the time of sentencing, twenty-three years, "is too old to be considered for leniency." We disagree with Swanson's characterization of the court's determination. During a thoughtful examination of each of the aggravating factors, the court noted:

> [T]his defendant is no longer a youthful offender. He's 23 years old. That may seem young to some people, but a person who's 18 or 19 might act impulsively, and the court gives them a second chance like you got in the theft case, but at your age, now you have to act more responsibly. Impulsive acts can lead to serious consequences.

The court did not reach its ultimate decision regarding sentencing by considering only Swanson's age, and the court's statement must be considered in context. Although Swanson's attorney argued that Swanson was still a young man, during his allocution, Swanson tried to convey his maturity and responsibilities by noting he was currently married; he and his spouse were responsible for the care of two children; and one child had an illness. Swanson was also not a neophyte to the criminal justice system as he was on probation for a felony and had other past criminal convictions. We disagree that the court abused its discretion by describing Swanson, at age twenty-three, as not being "a youthful offender," nor sentencing him as if he was new to the criminal justice system.

Swanson also contends the court's reasoning regarding his age implies a fixed sentencing policy. A fixed sentencing policy constitutes an abuse of

discretion because the sentencing court must exercise its discretion "without application of a personal, inflexible policy relating to one consideration." *State v. Hildebrand*, 280 N.W.2d 393, 397 (Iowa 1979). However the court specifically stated "*[t]his* defendant is no longer a youthful offender," suggesting the court did not have a fixed policy that all twenty-three-year-olds are excluded from being afforded a second chance. (Emphasis added.) The court also noted that Swanson had already been given a second chance.

The record does not suggest Swanson's age was an "attending circumstance which triggered the court's previously-fixed sentencing policy." *See id*. at 396. As required, the court "engage[d] in an independent consideration [of the] case." *State v. Hager*, 630 N.W.2d 828, 834 (Iowa 2001). The court did mention Swanson's age and the fact that he is no longer a "youthful offender," but this was only one of several factors considered by the court: the circumstances surrounding the crime, his past criminal history—including the fact that he was on probation for a felony conviction at the time of the act—as well as his substance abuse problem, and the recommendations of both his probation officer and the State.

B. Improper Considerations.

Swanson also argues the court improperly considered his juvenile "curfew" convictions when fixing his sentence.[2] Swanson relies on federal cases from the Seventh and Eighth Circuit to make his argument. He first argues that a curfew is a status offense, not a delinquent act. *See United States v. Ward*, 71 F.3d

[2]Swanson's PSI reveals convictions for seven curfew violations between the ages of sixteen and reaching majority at eighteen.

262, 263 (7th Cir. 1995) (determining a "status offense" is "conduct that would be lawful for an adult and is unlawful solely by virtue of the defendant's juvenile status"); *see also* Iowa Code § 232.2(12). Because his curfew violations are status violations, he argues they cannot be properly considered by the sentencing court. *See* U.S. Sentencing Guidelines Manual § 4A1.2(c)(2) (2012); *see also United States v. Webb*, 218 F.3d 877, 879 (8th Cir. 2000). However, these authorities relied upon by Swanson relate to the determination of a defendant's criminal history score under the Federal Sentencing Guidelines and are inapplicable to our sentencing procedures. *See* U.S. Sentencing Guidelines Manual § 4A1.2.[3]

Swanson also contends the court improperly considered his curfew violations by equating his "adjudications for non-status crimes" with other repeat offenses. Swanson refers to the court's statement at the sentencing hearing: "[T]he defendant has a lengthy record of criminal convictions. He has quite a few adjudications in juvenile court and then in adult court. He has been found guilty or pled guilty to numerous offenses; most are misdemeanors, many repeat offenses, which indicates a lawlessness on behalf of the defendant." Curfew violations were not Swanson's only repeat offense; he had multiple convictions for driving while suspended and driving while barred. Furthermore, although we acknowledge the presentence investigation report identifies Swanson's curfew violations as part of his "juvenile record," neither the PSI nor Iowa law describe these violations as juvenile adjudications. Rather, curfew violations of county or

[3] The federal law cited provides that juvenile status offenses should never be counted when compiling criminal history points under the Federal Sentencing Guidelines.

city ordinances are excluded from juvenile court jurisdiction and "are prosecuted as simple misdemeanors as provided by law." Iowa Code § 232.8(1)(b).

Swanson also contends the district court abused its discretion in imposing imprisonment by emphasizing the fact a death occurred. Swanson argues that all vehicular homicides involve death, yet probation may be granted. We acknowledge Swanson's argument, but it would have been imprudent to avoid the subject of the death caused by Swanson's criminal act during his sentencing hearing. We find no impropriety in the court's statements. Moreover, the court considered multiple factors before imposing sentence upon Swanson.

Based upon the aforementioned facts and reasons, we cannot say the district court abused its discretion or considered an improper sentencing factor in imposing the sentence upon Swanson. *See State v. Jose*, 636 N.W.2d 38, 41 (Iowa 2001) ("To overcome the presumption [in the court's favor], a defendant must affirmatively show that the district court relied on improper evidence such as unproven offenses.").

C. Consecutive Sentences.

Finally, Swanson maintains the district court failed to state specific reasons why it set his sentence to run consecutively with his earlier sentence rather than concurrently. He argues this failure prevents us from reviewing the decision for an abuse of discretion and requires us to remand for resentencing. We disagree. The district court explained its reasoning for the sentencing it was imposing at length, citing various reasons. *See State v. Delaney*, 526 N.W.2d 170, 178 (Iowa Ct. App. 1994) ("The trial court generally has discretion to impose

concurrent or consecutive sentences for convictions . . . . Consequently, the duty of a sentencing court to provide an explanation for a sentence includes the reasons for imposing consecutive sentences. The reasons, however, are not required to be specifically tied to the imposition of consecutive sentences, but may be found from the particular reasons expressed for the overall sentencing plan." (internal citations omitted)). After reciting numerous sentencing factors and weighing each factor, including rejecting the imposition of a fine or probation, the court stated, "I have to consider what will deter you and what will deter people in the State of Iowa and keep this crime from happening again," before imposing consecutive sentences.

We find the district court provided adequate reasons for imposing consecutive sentences as those reasons are apparent from the court's overall sentencing plan. No abuse of discretion is shown. *See also State v. Hennings*, 791 N.W.2d 828, 838–39 (Iowa 2010) (deciding the reasons for imposing consecutive sentences were apparent in the court's overall sentencing plan where "[t]he court spoke at length about the information it considered in making a sentencing determination and specifically, what factors influenced its ultimate decision").

IV. Conclusion.

Because we find the district court did not abuse its discretion when imposing a term of incarceration not to exceed ten years and in ordering the sentence to run consecutively with Swanson's earlier sentence, we affirm.

AFFIRMED.