IN THE COURT OF APPEALS OF IOWA

No. 6-526 / 05-0764
Filed October 25, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES ANDREW WEAVER,
Defendant-Appellant.

Appeal from the Iowa District Court for Muscatine County, Denver D. Dillard, Judge.

James Andrew Weaver appeals following entry of a guilty plea to and judgment and sentence for operating while intoxicated, second offense. **AFFIRMED.**

Kent A. Simmons and James D. Hoffman, Davenport, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney General, Virginia Barchman, Assistant Attorney General, Gary Allison, County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

PER CURIAM.

James Andrew Weaver appeals following entry of a guilty plea to and judgment and sentence for operating while intoxicated (OWI), second offense, in violation of Iowa Code section 321J.2(1)(b) (2003). We affirm his judgment and sentence.

I. Background Facts and Proceedings.

On December 15, 2004, Weaver, then a district associate judge, was charged with OWI, second offense. In February 2005 Weaver submitted a written guilty plea to the charged offense, which stated the plea was being entered pursuant to an undefined agreement with the State. In a March 2005 order the district court declined to accept the written guilty plea, noting it did not comply with Iowa Rule of Criminal Procedure 2.8. In particular, the court noted the guilty plea failed to specify the terms of the agreement with the State. Concluding "a further record will be necessary to satisfy the requirements of . . . rule 2.8," the court ordered preparation of a presentence investigation report (PSI), set a date for sentencing, and ordered Weaver to undergo a substance abuse evaluation.

At the April 2005 sentencing hearing, the court engaged Weaver in a colloquy that addressed the inadequacies of the written plea. In relevant part, the court noted it had now received a memorandum of plea agreement, which was signed by counsel. The memorandum set forth the State's favorable sentencing recommendation, which was conditioned upon Weaver's payment of fines, costs, surcharges, and any other restitution, and his substance abuse

evaluation and compliance with any recommended treatment.[1] The memorandum did not condition acceptance of the plea upon the court's concurrence.

After verifying with Weaver that the memorandum reflected his agreement with the State, the court accepted Weaver's guilty plea. Weaver was informed of and waived his right to a delay prior to sentencing and his right to file a motion in arrest of judgment. The court then immediately proceeded to sentencing.

The court asked Weaver if he knew "of any reason today why you would want to withdraw your plea of guilty and stand trial," to which Weaver responded, "No, sir." The court also asked if Weaver had any additions or corrections he wished to make to the PSI. Weaver clarified some minor matters, including those relating to income and expenses of his newly-established law practice, but had no other additions or corrections to the PSI. Weaver did not address the portion of the PSI that noted he had reported receiving treatment at the MARC program at Genesis West in Davenport, Iowa, following an August 2004 relapse; that he had reported he was currently involved in Cadeuses, an addiction aftercare group for licensed professionals; and that the investigator requested but did not receive verification of his participation in these programs.

The court received the sentencing recommendations of the State and Weaver's defense counsel, which were consistent with the memorandum of plea agreement. It then allowed Weaver an opportunity to "make whatever presentation that you want to make . . . [b]ecause I don't feel bound by the plea

[1] The memorandum further noted the State would resist Weaver's request to receive credit for time he spent in an in-patient treatment following his arrest, but that if Weaver's request for credit was denied the State would not resist any applications for work release or AA and aftercare attendance.

agreement . . . ." Weaver spoke at length about "the background of the offense and the treatment and other efforts that I've undertaken and the after care that I've participated in since treatment," including his participation in the MARC program and Cadeuses.

In pronouncing sentence, the court emphasized the protection of the community and Weaver's opportunity for rehabilitation. Concluding Weaver would not benefit from incarceration, the court invoked section 904.513, which provides for a continuum of programming for the supervision and treatment of OWI offenders committed to the custody of the Department of Corrections (DOC). The court sentenced Weaver to the DOC for an indeterminate two-year term, for placement at an appropriate alcohol treatment facility.

At this point Weaver requested that the court leave the record open to receive evidence regarding the MARC program. Weaver indicated the treatment he would receive at a DOC-approved facility would be duplicative of the MARC program, and contended a sentence that required further residential treatment was punitive in nature. The court declined to leave the record open or to withhold imposition of sentence, but stated its willingness to reconsider Weaver's sentence at a later evidentiary hearing.

The April 21 judgment and sentence committed Weaver to the custody of the director of the DOC for an indeterminate two-year term, with a recommendation that Weaver be placed at a residential facility pursuant to section 904.513. The court stated

> the reasons and factors considered by the court for this sentencing include the following: The nature of the offense; the Defendant's age; his prior record; the Defendant's unsuccessful attempts at rehabilitation in the past; the maximum protection of the community;

> and it will provide the Defendant with the maximum opportunity for rehabilitation.

Weaver filed a motion for reconsideration of sentence, requesting an evidentiary hearing to provide him an opportunity to demonstrate that treatment under the continuum would be duplicative of prior current treatment. He also moved the court to (1) order an addendum to the PSI, given that the presentence investigator had now received records from MARC and Cadeuses, (2) to reconsider his motion to reopen the record, and (3) to delay mittimus pending his hearings on the above motions.

The court set Weaver's motion to reconsider sentence for hearing, but denied his remaining motions. The court stated,

> Based upon the conclusion reached by the court that the Defendant has a serious alcohol and substance abuse addiction problem and the past failures of treatment, the court believes that the Defendant's sentence should commence and that any reconsideration of sentence would be based, in part, upon the progress of the Defendant in the treatment program pursuant to Iowa Code Section 904.513.

Weaver immediately filed a notice of appeal. The court then cancelled the hearing on Weaver's motion to reconsider sentence. The court explained that, because the appeal and posting of an appeal bond had stayed execution of Weaver's sentence, it was "impossible for the court to evaluate the rehabilitative effect of the sentence."

On appeal, Weaver asserts the district court abused its discretion when it (1) determined that it would not be bound by the plea agreement, but did not afford him an opportunity to withdraw his guilty plea or inform him that if he persisted in his guilty plea the court could impose a disposition less favorable than that provided for in the plea agreement, (2) denied his requests to leave the

record open to receive information related to the MARC program and Cadeuses aftercare or to order an addendum to the PSI that would include this information, (3) considered impermissible factors in imposing sentence, and (4) committed him the custody of the director of the DOC, which was not consistent with and thus not supported by the court's express intent that he receive residential alcohol treatment rather than incarceration.

II. Scope and Standards of Review.

We review the district court's actions for the correction of errors of law. Iowa R. App. P. 6.4. We reverse the district court only upon a demonstrated abuse of discretion. *See State v. Wenzel*, 306 N.W.2d 769, 771 (Iowa 1981) (plea proceeding); *State v. Alloway,* 707 N.W.2d 582, 584 (Iowa 2006) (sentencing). Abuse is found only when the court's discretion has been exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Laffey*, 600 N.W.2d 57, 62 (Iowa 1999).

III. Plea Proceedings.

Weaver first asserts that, because the district court refused to be bound by the plea agreement, it was required to afford him an opportunity to withdraw his guilty plea and to inform him that if he persisted in his guilty plea the court could impose a disposition less favorable than that provided for in the plea agreement. He asserts the court abused its discretion when it did not do so, because such an opportunity and warning is required by Iowa Rule of Criminal Procedure 2.10(4), which provides:

> *Rejection of plea agreement*. If, at the time the plea of guilty is tendered, the court refuses to be bound by or rejects the plea agreement, the court shall inform the parties of this fact, afford the defendant the opportunity to then withdraw defendant's plea, and

> advise the defendant that if persistence in a guilty plea continues, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

As the State points out, the foregoing is a challenge to the adequacy of the plea proceedings. To preserve such a challenge a defendant must first file a motion in arrest of judgment. *State v. Antenucci*, 608 N.W.2d 19, 19-20 (Iowa 2000). Weaver did not file a motion in arrest of judgment, and in fact waived his right to do so. Accordingly, this alleged error is not preserved for our review. *Id*.

Moreover, even if we were to consider Weaver's contention, we would conclude it is without merit. On its face, subsection (4) appears to apply any time a court declines to follow a plea agreement entered into by the defendant and the State. However, subsection (4) cannot be viewed in isolation. Rather, we must "consider the context of the provision at issue and strive to interpret it in a manner consistent with the [rule] as an integrated whole." *Griffin Pipe Products Co. v. Guarino*, 663 N.W.2d 862, 865 (Iowa 2003).

When we do so, it soon becomes clear that the requirements of subsection (4) are meant to apply when the plea agreement has been conditioned upon the court's concurrence in the agreement between the parties. *See Wenzel*, 306 N.W.2d at 770-71; *State v. Barker*, 476 N.W.2d 624, 626 (Iowa Ct. App. 1991).[2] Here, nothing in the written guilty plea, the memorandum of

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[2] Subsection (4) is preceded by the following relevant provisions:

> (2) *Advising court of agreement*. If a plea agreement has been reached by the parties the court shall require the disclosure of the agreement in open court at the time the plea is offered. Thereupon, if the agreement is conditioned upon concurrence of the court in the charging or sentencing concession made by the prosecuting attorney, the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until receipt of a presentence report.

plea agreement, or the transcript of proceedings demonstrates any intent that the plea agreement between Weaver and the State be conditioned upon the court's concurrence in any certain disposition. Thus, the court was not required to allow Weaver an opportunity to withdraw his guilty plea,[3] or to inform him that if he persisted in his guilty plea it might impose a less favorable disposition than contemplated in the agreement.[4]

IV. Supplementing the Record.

Weaver next asserts the court abused its discretion when denied his requests to leave the record open to receive information related to his participation in the MARC program and Cadeuses aftercare, and to order an addendum to the PSI that would include this information. We cannot agree.

Weaver was given ample opportunity to address any perceived errors or omissions in the PSI, and to fully explain his participation in both programs. As the State notes, it was only after the court pronounced sentence, and Weaver realized the court intended that he be placed in a residential alcohol treatment program, that a request was made to present additional information about his prior treatment. We cannot conclude it was clearly unreasonable or untenable for the court to refuse Weaver's request to supplement the record, particularly as

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> (3) *Acceptance of plea agreement*. When the plea agreement is conditioned upon the court's concurrence, and the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than that provided for in the plea agreement. In that event, the court may accept a waiver of the use of the presentence investigation, the right to file a motion in arrest of judgment, and time for entry of judgment, and proceed to judgment.

[3] We note the court did allow Weaver an opportunity to withdraw his guilty plea, albeit after the plea was accepted, when it asked him if he knew "of any reason today why you would want to withdraw your plea of guilty and stand trial."

[4] We further note the relevant part of the agreement only required the State to make a certain sentencing recommendation, which it did.

the court expressed a willingness to consider such evidence during a hearing to reconsider Weaver's sentence.

V. Sentencing.

Finally, we turn to Weaver's challenges to the sentence imposed by the district court. In determining the proper sentence, the district court

> should weigh and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of his reform. The courts owe a duty to the public as much as to defendant in determining a proper sentence. The punishment should fit both the crime and the individual.

State v. August, 589 N.W.2d 740, 744 (Iowa 1999) (citation omitted). The foregoing are some of the "minimal essential factors" to consider when exercising sentencing discretion. *State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979).

The court must state on the record its reasons for selecting a particular sentence. Iowa R. Crim. P. 2.23(3)(*d*). However, it is generally not required to give reasons for rejecting particular sentencing options. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). We look to all parts of the record to find supporting reasons for the sentence imposed. *State v. Boltz*, 542 N.W.2d 9, 11 (Iowa Ct. App. 1995). A sentence will be vacated, and the matter will be remanded for resentencing, if the district court considered an improper factor when imposing sentence. *State v. Carrillo*, 597 N.W.2d 497, 501 (Iowa 1999).

A. Impermissible Factors. Weaver asserts the court abused its discretion when it considered two impermissible factors in imposing sentence: his former position as a district associate judge and the fact "the court intend[ed] the commitment [to residential treatment] to last only as long as necessary for completion of treatment." A review of the record refutes both contentions.

The court's primary considerations when imposing sentence were the protection of the public and assuring that Weaver received the maximum possible opportunity for rehabilitation. The court relied on the knowledge Weaver gained while serving on the district court, along with other factors, in determining that he required additional residential treatment to appropriately deal with his alcohol addiction. Responding to Weaver's own statement that he brought "extra issues to the docket," the court commented:

> [T]he extra issues that . . . I believe that you bring are not some issue of disgrace or abuse of your position or even some violation of the oath that we take for this job. The extra issues you bring I think have to do with how much experience you've had dealing with cases like this and how much you knew about the subject and the various alternatives available to you and the signs you've talked about it yourself about what is an alcoholic, what are the signs, the denial, the programs that are available. You had all of that extra information, and so to that extent I agree with you, you bring extra issues. . . . [I]t's been suggested that somehow you should be held accountable for offense because you were a judge at this time. And with the exception of what I just made reference to, I disagree with that. You don't deserve some special punishment because you were a judge at the time that this happened. . . . For me the issue is how much insight you had available to you, how much based upon your obvious intellect and your direct experience with these kinds of cases, how much you knew about the problem and the fact that the first offense did not take hold and drive home to you what the problem was for you.

The court specifically stated "special accountability because of the position that you h[e]ld, is not a legitimate reason" for a particular sentence, and that

> the only way that your prior profession has any impact on this subject, I believe, is on the rehabilitation issue in which you had so much information available to you and . . . because of your intellect that you could understand and analyze and process, and all of the programs that you knew were available to you.

The court went on to state,

> I'm concerned about this being the last time James Weaver is before a court for any reason, but certainly operating while

> intoxicated. . . . [A]s I've repeatedly referenced, you're an intelligent gentleman . . . and you have all of this information available to you because of your profession and experience, and you had to know that drinking any amount could put you in jeopardy if you were driving because .08 is not really a high level in relation to number of drinks. . . . *So having had the experience and jeopardizing your profession, you still were unable to overcome your denial and your addiction, and you were still combining drinking and driving. And I am not convinced . . . you are able in the long run to continue to abstain and continue to separate the drinking from the driving. And I don't think it's because you disrespect the system or . . . you don't understand, but . . . that it's beyond your willpower to deal with this subject, at least I'm not convinced at this time that you can control it.* I don't want to send you to prison . . . [and] I think county jail is a terrible answer for someone who is an alcoholic. . . . . So what I'm going to do is I'm going to invoke section 905.413 . . . .
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> . . . [U]pon achievement of the maximum benefits from the program, you would be released on parole, I think. And that's my intent. And I think that in your case that could be a significantly shorter period of time than it is for standard persons placed there who don't have the insight and the number of programs that you've already participated in. But I think that another go around of intensive treatment is appropriate, and that's the setting that I think is the best available that we can monitor and control.

(Emphasis added).

Contrary to Weaver's suggestion, we do not read the foregoing as a conclusion by the district court that an intelligent individual with access to information and resources should be able to control or overcome an alcohol addiction. Rather, the court reasonably concluded that if Weaver risked his career by operating a motor vehicle while intoxicated for not the first but the second time, after having received treatment, and being fully aware of relevant information and resources, then he was not yet able to maintain his sobriety and accordingly required further intensive treatment. We see nothing impermissible in considering such circumstances in an attempt to tailor the sentence to the individual needs of the defendant. *See State v. Cole*, 452 N.W.2d 620, 622

(Iowa Ct. App. 1989) ("A defendant's alcoholism, and his attempts or failure to control it, are factors to be considered by a sentencing court.").

We also reject Weaver's contention that the court impermissibly considered the possible duration of residential treatment as a factor for imposing sentence. The language Weaver refers to, which we have quoted above, is no more than the court's explanation of residential treatment under the OWI continuum, and why it believed Weaver would benefit from such placement. *See* Iowa Admin. Code r. 201-47.4 (explaining structure of continuum program).

B. Reasons For Sentence. We therefore turn to Weaver's contention that the district court abused its discretion when it committed him to the custody of the DOC under the continuum of section 904.513, because there was no assurance he would be placed in a residential alcohol treatment program as the court intended, and the possible alternative of incarceration was not supported by the reasons the court gave for imposing sentence. As Weaver points out, the district court stated quite clearly that it believed Weaver would not benefit from incarceration, and that he would be best served by participation in a residential alcohol treatment program. As Weaver further points out, although placement in a residential treatment program is one of the continuum of options available under section 904.513, so too is incarceration. Moreover, the decision of which alternative a defendant will receive is a matter within the purview of the DOC, and not the district court. *Id*. Thus, Weaver reasons, since the court's sentence could possibly lead to incarceration, it is wholly inconsistent with the stated reasons for imposing that sentence.

We recognize the apparent tension between the court's intent that Weaver receive residential treatment, and the possibility of incarceration under the sentence imposed. However, we find it significant that the continuum under section 904.513 is a program specially developed to facilitate the treatment of individuals convicted of OWI offenses. There is a presumption that "assignment will be made to the least restrictive and most cost-effective component of the continuum for the purposes of risk management, substance abuse treatment, education, and employment." Iowa Admin. Code r. 201-47.2(1). While incarceration is a possible alternative, it will generally be imposed only where warranted by the offender's previous criminal record, present charges, and attitude toward treatment. *Id*. Moreover, placement in the continuum ensures that an offender will receive treatment under a high level of supervision, while at the same time be encouraged, to the extent possible, to pursue outside employment. *Id*. at 201-47.4.

All of the foregoing is consistent with the court's desire that Weaver receive intensive residential treatment, and its conclusion that the residential treatment available under the continuum was "the setting that I think is the best available that we can monitor and control." We accordingly cannot conclude the district court abused its discretion when imposing sentence.

AFFIRMED.